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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONERS,

v.

BOSTON CHAPTER, N.A.A.C.P., INC. and THE UNITED STATES OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review judgments of the United States Court of Appeals for the First Circuit entered on September 18, 1974 and November 8, 1974.

Opinions Below

The opinions of the Court of Appeals dated September 18, 1974 and November 8, 1974 are not as yet reported and appear, respectively, in Appendix "A" and "B" hereto. The opinion rendered by the United States District

Court for the District of Massachusetts is reported at 371 F. Supp. 507 (D. Mass. 1974) and appears in Appendix "C" hereto. Supplemental orders entered by the District Court on February 11, 1974 and March 6, 1974 appear in Appendix "D" and "E" hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether evidence of a statistical underrepresentation of black individuals employed within the fire departments of two Massachusetts cities coupled with the generalized proposition that black and Spanish surnamed individuals typically perform poorly on pen and pencil examinations similar to a firefighter entrance examination administered by the petitioners and applicable to one hundred and seven (107) Massachusetts cities and towns is sufficient to shift the burden of proof in a public employment discrimination case from the plaintiffs to the defendants?

2. Whether the petitioners satisfied their burden of proof by virtue of the district court's finding that the firefighter entrance examination was valid for several important criteria of firefighter job performance?

3. Whether consistent with the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 2000e-2(j) the District Court may order a state to establish fixed racial hiring quotas and compel all Massachusetts cities and towns subject to Massachusetts Civil Service law with a black and Spanish surnamed population in excess of one percent, to award such in-

dividuals a superior right to appointment as firefighters over persons of all other races until each locality appoints a sufficient percentage of black and Spanish surnamed individuals to equal the percentage of black and Spanish surnamed individuals residing within the locality?

4. Whether consistent with the Eleventh Amendment to the United States Constitution, the Court of Appeals may tax costs of appeal against the treasury of a state?

Constitutional and Statutory Regulations Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of laws."

Massachusetts Constitution, Pt. 2, c. 2. § 1, Art. 11, provides:

> "XI. No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the

necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

42 U.S.C. § 2000e-2(j) provides in pertinent part:

"Nothing contained in [Title VII] shall be interpreted to require . . . preferential treatment to any individual . . . because of race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number of [sic] percentage of persons of such race, color, religion, sex, or national origin in any community . . . ."

29 C.F.R. [illegible] provides in pertinent part:

"(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance of usefulness is affected by several factors . . . ."

Statement of the Case

Two civil actions were brought against the Director[1] of the Massachusetts Division of Civil Service (hereinafter the "Director"), the Commissioners of Civil Service for the Commonwealth of Massachusetts (hereinafter the "Commissioners") and the City of Boston alleging a broad range of firefighter selection procedures administered by the Director and by the City of Boston, severally, discriminated against black and Spanish surnamed individuals. The first action was brought by the Boston Chapter, N.A.A.C.P., Inc., and several black and Spanish surnamed individuals under 42 U.S.C. §§ 1981, 1983. The jurisdiction of the District Court was based upon 42 U.S.C. §§ 1343(3), 1343(4). The second action was brought on January 24, 1973 by the Attorney General of the United States under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq.* The Boston Chapter, N.A.A.C.P. suit alleged the defendants had violated the civil rights of black and Spanish surnamed individuals through administration of a wide variety of selection procedures utilized to qualify firefighter applicants for eligibility as firefighters in the 107 Massachusetts cities and towns subject to the Massachusetts Civil Service Law. Mass. Gen. Laws, c. 31, §§ 1 *et seq.* The suit brought by the Attorney General contained similar allegations with respect to the City of Boston only.[2] Together the plaintiffs specifically alleged a mandatory swim requirement, interviews and possible rejection of firefighter applicants

[1] When the complaints were filed in the District Court the Honorable Mabel Campbell was Director. However, since August 14, 1973 the Honorable Edward W. Powers has been Director. Director Powers has never been made a party to these actions by substitution or amendment of the complaint or otherwise.

[2] The City of Boston is the only municipality named as a party in either suit.

due to past criminal records, approval by the Director of a high school education requirement[3] requested by fifteen cities and towns, recruitment procedures and a firefighter entrance examination (hereinafter "FFEE") administered by the Director discriminated against black and Spanish surnamed individuals. Although such procedures are administered by the Director and a list of eligible persons is established by him for the position of firefighter, actual appointments are made by the 107 cities and towns after each locality has interviewed and screened eligible candidates in accordance with civil service rules.

The District Court, with the assent of all parties, consolidated the actions. In July of 1973 the plaintiffs filed motions for a preliminary injunction and a hearing was held on those motions commencing on July 30, 1973 and ending on September 17, 1973. The scope of the hearing was limited to plaintiffs' allegations concerning the FFEE and recruitment practices of the defendants. The parties stipulated that the hearing would be treated as a hearing on the merits with respect to the FFEE pursuant to F. R. Civil P. 65(a)(2).

A pre-hearing stipulation was entered into by the parties which set forth the eligibility requirements for the position of firefighter applicable to all 107 cities and towns including:

" (a) no residency requirement;
(b) age 19 to 35 years of age;
* * * * *
(e) good moral character;
(f) high school diploma or equivalency certificate required when requested by a city or town;
* * * * *

[3] The City of Boston does not impose a high school education requirement as a precondition to employment as a firefighter.

> Prior to the issuance of an opinion of the Attorney General of the Commonwealth, in November 1972, pursuant to Massachusetts state law, certain cities and towns, including Boston, had residency requirements for firefighter service."

The parties further stipulated as to the percentage black populations of five[4] of the 107 cities and towns subject to civil service law. No stipulation was made nor was any evidence received by the District Court with respect to the Spanish surnamed populations of any Massachusetts city or town. For each of the five cities the parties stipulated the percentage of black and Spanish surnamed individuals employed in the fire services of the five fire departments. The cities with the highest disparity between the percentage of blacks or Spanish surnamed individuals employed as compared with black populations were Boston (16% population to 0.9% employed) and Springfield (13% in population to 0.2% employed). The city with the least disparity was the City of Worcester (2% in population to 1% employed) App. "C", p. 56.

The District Court found that when the last statewide FFEE was administered in 1971 applicants were given the option of identifying their race, color or national origin.[5] Some 84% of all applicants responded to an optional racial questionnaire. A resulting analysis of racial passing scores on the FFEE, as found by the District Court, revealed by racial group the following passing rates: Caucasian, 56%; White, 55%; Negroid, 54%; Blacks, 44.5%; Spanish origin, 33.3%. App. "C", p. 55. The District Court found the examination statistics insufficient

[4] Boston, Springfield, Cambridge, New Bedford, Worcester.

[5] Caucasian, Negroid, Mongoloid, White, Black, Yellow, Spanish and non-Spanish.

to establish a *prima facie* case that the FFEE is discriminatory. Instead, the District Court relied upon the gross population statistics for blacks and not Spanish surnamed individuals in the cities of Worcester and Boston in ruling the FFEE was *prima facie* discriminatory against blacks and Spanish surnamed individuals in all 107 Massachusetts cities and towns subject to Civil Service law. App. "C", pp. 55-56. The District Court received evidence that the Division of Civil Service had engaged in intensive minority recruitment prior to administration of the FFEE and ruled ". . . it is not probable plaintiffs will succeed on the merits as to the issue of alleged discriminatory recruitment policies on the part of the Civil Service defendants . . . ." App. "C", p. 66.

With respect to the *prima facie* case, the Court of Appeals did not approve the District Court's finding of discriminatory impact based on population comparisons but instead put conclusive weight upon generalized statements by experts from both parties that ". . . black and Spanish surnamed candidates typically perform more poorly on paper-and-pencil tests of this type." App. "A", pp. 26-27.

The Director and Commissioners of Civil Service introduced evidence that they had caused a validation study to be performed by an expert in the area of employment selection tests. The expert testified he had performed a "concurrent criteria-related validation study" which measured two groups of Boston firefighters for performance on 81 elements of job performance which were combined into 13 important criteria of firefighter duties. Plaintiffs' expert agreed all 13 criteria were important. App. "C", p. 62. Defendants' expert concluded that 7 of the criteria were both practically and significantly correlated between FFEE scores and job performance. Plaintiffs' expert agreed that only one such correlation need

be shown to establish compliance with Equal Employment Opportunity Commission guidelines (EEOC) relative to test validity. See 29 C.F.R. § 1607.5(c)(1). The District Court found the FFEE correlated with ". . . only two or perhaps four, significant correlations . . ." and minimally valid. App. "C", pp. 62-63, 71.

Notwithstanding the command of EEOC guidelines, the District Court was of the opinion the FFEE was not shown to be valid for enough elements of job performance and held the defendants had not sustained their burden of proof and had unintentionally discriminated against black and Spanish surnamed individuals.

The District Court (1) enjoined any future administration of the FFEE and (2) ordered that if a new examination was administered, it must be validated in accordance with EEOC guidelines and be preceded by 45 days of recruitment by the City of Boston and the Division of Civil Service. The Court ordered that until such time as a new test is administered, firefighters may only be appointed on a "*provisional*" civil service basis from the presently existing eligible list. (Pursuant to Massachusetts law, *all* provisional appointees must lose their positions upon the establishment of a new eligible list. Mass. Gen. Laws, c. 31, § 15) The order further provided that any new eligible list shall be composed of four separate groups (A, B, C and D). The groups are to be racially segregated with Groups A and C containing the names of black and Spanish surnamed individuals only. Group B will contain the names of individuals of all races whose names are on the current eligible list, and Group D will be comprised of all races other than black and Spanish surnamed individuals. Certification of eligible names for permanent appointments will be made strictly on a basis of race with one black or Spanish surnamed individual certified for appointment to every two firefighter vacan-

cies within the cities of Boston and Springfield and to every three vacancies in all of the 107 cities and towns which have a black or Spanish surnamed population which exceeds one percent until each locality has an equal percentage of blacks and Spanish surnamed individuals employed within its fire department as reside in the locality.

On appeal,[6] the Court of Appeals affirmed, but stated that no provisional employee will be "fired" and that provisional appointees will be given permanent status as black and Spanish surnamed individuals are appointed. App. "A", p. 38, fn. 16. Assuming a large number of provisional firefighters are hired, the statement of the Court of Appeals will require that most new firefighters employed subsequent to establishment of a new eligible list will be either black or Spanish surnamed individuals.

In a subsequent opinion, the Court of Appeals awarded costs of appeal notwithstanding the defendants' opposition to such an award as barred by the Eleventh Amendment to the Constitution. App. "B".

Reasons for Granting the Writ

I. The Decision Below Squarely Conflicts With Prior Decisions of this Court and Various Courts of Appeals With Respect to What Burden Is Required to Establish a *Prima Facie* Case of Discrimination and the Burden of Proof of Defendants if a *Prima Facie* Case Is Established.

This Court has not given consideration on the merits to a case concerning racial discrimination in employment opportunities since *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs* a general intelligence test and edu-

[6] The City of Boston did not appeal the District Court order.

cational requirement were shown to cause rejection of blacks at a higher rate than other racial groups.

The employment selection test at issue in that case was established to pass 58% of all white candidates while only passing 6% of all black candidates. This Court's inquiry was triggered by a demonstration that employment selection tests operated ". . . to disqualify Negroes at a substantially higher rate than whites . . . ." *Id.* at 426. This Court stated that an employment selection test is only prohibited where it ". . . operates to *exclude* Negroes [and] cannot be shown to be related to job performance . . . ." *Id.* at 431.

It is only those employment practices and devices that discriminate on a basis of race, religion, sex or national origin that are outlawed under the civil rights acts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800; *Griggs* v. *Duke Power Co.*, *supra*, at 429-430. Accordingly, most Courts of Appeals have required that plaintiffs establish a gross disparity in examination passing rates by race before a *prima facie* case of discrimination can be established. See *Vulcan Society* v. *Civil Service Commission*, 490 F2d 387 (2 Cir. 1973), (whites passed at 2 times the rate of all others); *Bridgeport Guardians* v. *Civil Service Commission*, 482 F.2d 1333 (2 Cir. 1973), (whites passed at 3½ times the rate of all others); *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1184, *modified* 486 F.2d 1134 (4 Cir. 1973), (whites passed at a rate almost 5 times the passing rate for all others); *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, *affirmed in part, reversed in part*, 473 F.2d 1029 (3 Cir. 1973), (whites passed at a rate more than 1¾ times the rate of all others); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5 Cir. 1973), (whites passed at a rate more than 3 times the rate of all others); *Contra*,

Carter v. *Gallagher*, 452 F.2d 315 (8 Cir. 1972). Moreover, the second and third circuits have declined to inquire into employment selection tests where plaintiffs are unable to prove racially disparate passing rates. ***Bridgeport Guardians, Inc.*** v. ***Civil Service Commission, supra; Commonwealth of Pennsylvania*** v. ***O'Neill, supra.***

In the instant case, both the District Court and Court of Appeals departed from the requirement that the FFEE be shown to reject black and Spanish surnamed individuals at a higher rate than other persons. The District Court could not find the passing rate of different races on the FFEE ". . . sufficient in themselves to establish a *prima facie* showing the exam is discriminatory." App. "C", p. 56. Instead, the District Court found a gross disparity between the percentage of black and *not* Spanish surnamed individuals in the populations of only two Massachusetts cities and concluded such a showing combined with the "meager" examination statistics was sufficient to establish a *prima facie* case of discrimination. App. "C", p. 56. The Court of Appeals declined to approve the District Court's reliance on gross census statistics but instead went well beyond the District Court's findings and adopted as its logic the proposition that minorities generally perform poorly on tests similar to the FFEE so the FFEE must discriminate against black and Spanish surnamed individuals. App. "A", pp. 26-27.

The rule established by the District Court and the syllogism announced by the Court of Appeals are inconsistent with decisions of other courts and Congressional intention in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In a triology of recent cases, this Court has rejected gross population comparisons as sufficient to establish a *prima facie* case of discrimination, since naked statistical arguments do not take into account the plain truth that citizens are not fungible

for purposes of determining whether any racial group has been excluded. *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605 (school nominating panel); *Jefferson* v. *Hackney,* 406 U.S. 535 (reduction in state welfare programs); *Turner* v. *Fouche,* 396 U.S. 346 (jury selection system). The courts of appeals have almost uniformly not relied on such statistical comparisons and have recognized that census data simply does not reflect the appropriate applicant pool or identify any employment practice as discriminatory. See *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1379, n. 6 (5 Cir. 1974); *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1171-1172, 1176 (2 Cir. 1972). See also, *Castro* v. *Beecher,* 334 F. Supp. 930, 936, *modified* 459 F.2d 725 (1 Cir. 1972). Additionally, it is clear that Congress, in enacting Title VII, intended that racial imbalances between the racial composition of a work force and racial composition of individuals employed would not subject employers to suit. Instead, plaintiffs would have the burden of proving discrimination. See 110 Cong. Rec. 2558-2560 (Remarks of Congressman Goodell); 110 Cong. Rec. 1518 (Remarks of Congressman Celler); 110 Cong. Rec. 14329 (letter from Senator Dirkson to Senator Williams).

It is equally clear the Court of Appeals' general proposition that minority individuals are presumed to perform poorly on paper-and-pencil tests falls far short of any showing or indication the FFEE has racial impact. Indeed, in this respect, the holding of the Court of Appeals is contrary to this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424. In *Griggs,* this Court recognized a congressional concern that examinations should not be subject to scrutiny by the mere general speculation that ". . . whites performed better than blacks . . . ." *Id.* at 434, n. 10. In the enactment of Title VII, congressional attention was directed to the case of *Myart* v. *Motorola*

Co., (decided by the Illinois Fair Employment Commission), where an employment test was struck down as a test whose norms were established on advantaged groups [7] and presumed to disqualify blacks. The basis of the *Motorola* decision was rejected by Congress as this Court noted in *Griggs* v. *Duke Power Co., supra,* at 434, n. 10.

By its decision, the Court of Appeals has revived the obsolete and congressionally condemned rule of the *Motorola* case. Such a departure from established precedent is of serious concern to the petitioners who supervise and administer thousands of examinations for public employers within the Commonwealth of Massachusetts. The profound consequences of the Court of Appeals' decision upon not only the Massachusetts Civil Service System but every other employment system, both public and private, is obvious and merits this Court's consideration.

II. The Decisions Below Are Contrary to this Court's Pronouncement With Respect to Validation of Employment Selection Tests.

In *Griggs*, this Court noted the Equal Employment Opportunity Commission had issued guidelines with respect to employment test validation and that those guidelines are entitled to great deference. *Id.* at 433-434. See, 29 C.F.R. § 1607. The Courts have given EEOC guidelines weight while not requiring precise compliance for all of the technical procedures set forth in the guidelines. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 913 (5 Cir. 1973). The validation study performed in this case was conducted in accordance with EEOC requirements and is described as a "concurrent criteria-related validity study." The study compared firefighters' FFEE

[7] The full text of the *Motorola* case is reprinted at 110 Cong. Rec. 5662-5664 (1964).

test scores with their performance of 81 different elements of a firefighter's job. These 81 elements were combined into 13 relevant criteria of job performance.

The District Court found the FFEE valid for "two or perhaps four" of the relevant criteria. App. "C", p. 63. Although the District Court recognized that EEOC guidelines only require that validity be demonstrated for one[8] such criteria of job performance, the Court concluded that such compliance was not sufficient for the defendants to shoulder their burden of proof in this case. In our view, the standard of test validation developed by the District Court imposes a standard much stricter than the standard established by EEOC guidelines. EEOC guidelines are entitled to great deference and should be followed by the courts. By placing a higher burden of test validity upon defendants in this case, the Courts below have carved out a new rule of law where utilization of employment tests may well become indefensible as impossible to validate. We believe the new rule signals the end of objective test standards in determining employment selection in favor of selection on a non-merit basis where the race of job applicants becomes more important than fitness for the job. See Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1127-1129 (1971).

III. The Decisions Below Initiate Racial Discrimination and Squarely Conflict With Prior Decisions of this Court, the Provisions of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 2000e-2(j).

The relief ordered by the courts below guarantees black and Spanish surnamed individuals an exact percentage of racial mixing in each of the 107 fire services subject to

[8] 29 C.F.R. 1607.5(c)

Massachusetts Civil Service Law with a combined black and Spanish surnamed population in excess of one percent. The District Court's order will not be fulfilled until the racial composition of each fire department equals the percentage of black and Spanish surnamed individuals who reside in the community subject to the Court's order. The Court of Appeals interpreted the District Court's order to require that until such time as new eligible lists are established, firefighters will be provisionally appointed from the existing eligible list. After establishment of any new eligible list, only black and Spanish surnamed individuals will be hired until the number of individuals so employed equals the number of provisionally appointed firefighters. Subsequently, applicants will be hired in accordance with mathematical ratios until a precise racial balance is reached for each fire department. We note the only fire department so affected which was before the Court was the Boston Fire Department. No persons of racial groups other than black and Spanish surnamed individuals who are subject to the Court's order were parties to the case.[9]

This Court has not approved a racial classification since the cases of *Korematsu* v. *United States*, 323 U.S. 214, and *Hirabayshi* v. *United States*, 320 U.S. 81. Instead, this Court has consistently struck down racial classifications which operated to favor one race over the other. Indeed, official sources of racial classification have never been sanctioned by this Court. *Loving* v. *Virginia*, 388 U.S. 1, 10; *Bolling* v. *Sharpe*, 347 U.S. 497, 499. The equal protection and due process commands of the Fifth and Fourteenth Amendments to the United States Constitution can never be achieved through the imposition

[9] Since these individuals and localities were not parties to the action, the Court abused its remedial powers by issuing an order affecting their rights. *Milliken* v. *Bradley*, 42 U.S.L.W. 5249 (July 25, 1974).

of new inequities. *Shelley* v. *Kramer*, 334 U.S. 1. As a remedy to segregation of school systems, this Court has not hesitated to sanction reassignment of students, but has continuously cautioned that any particular degree of racial mixing would be disapproved and would require reversal. *Milliken* v. *Bradley, supra* at 52, 56; *Winston-Salem/Forsyth Bd. of Educ.* v. *Scott*, 404 U.S. 1221, 1230-1231; *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1. The redistribution which is appropriate in school desegregation cases has recently been observed by one member of this Court to be constitutionally impermissible with respect to selection of applicants for law schools, as such a policy, if applied to exclude from admission any individual because of his race, would intrude upon constitutional rights. *DeFunis* v. *Odegaard*, 416 U.S. 312, 336, n. 18. (Douglas, J. dissenting). Accordingly, this Court has upheld the contempt convictions of picketers who sought to force an employer to guarantee that 50% of his employees would be black. *Hughes* v. *Superior Court*, 339 U.S. 460. More recently, this Court has reinforced its rejection of racial barriers by stating that the command of Title VII of the Civil Rights Act of 1964 is that such factors as race become irrelevant in employment selection practices. *Griggs* v. *Duke Power Co., supra*, at 436.

The order of the District Court is patently color-conscious and will require that upon the establishment of a new eligible list, most, if not all, existing vacancies be filled by black and Spanish surnamed individuals. For the foreseeable future, blacks and Spanish surnamed individuals will be guaranteed employment while all other races compete for one-half of the positions in the cities of Boston and Springfield and two-thirds of the positions in many other communities.

The Massachusetts Division of Civil Service will become the state agency that administers the Court's racial formula by compelling localities to appoint on a basis of race. To individuals other than blacks and the Spanish surnamed persons, constitutional guarantees which heretofore have been the essence of equal protection will evaporate. They will be citizens with inferior constitutional rights under the order of the District Court.

Both courts below were of the opinion that race conscious relief was necessary to cure past discrimination and that such relief is within the remedial powers of the Federal courts. See cases cited App. "A", p. 39, *Contra, Harper* v. *Mayor and City Council of Baltimore,* 486 F.2d 1134 (4 Cir. 1973). Whatever precedent exists within the majority of the circuits with respect to the constitutionality of court-ordered racial quotas, the issue is of monumental public importance. There are indeed "[F]ew constitutional issues that have stirred as much debate, and they will not disappear" until decided by this Court. *DeFunis* v. *Odegaard, supra,* (Brennan, J. dissenting).

Congress has addressed the precise issue in enacting § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), which requires that no person be given preference in employment opportunities because of race on account of any imbalance which exists in the racial composition of a work force. Throughout the Senate and House debates on Title VII, the proponents of the Title were resolute that courts would not order hiring quotas. See e.g., 110 Cong. Rec. 1518 (Remarks of Congressman Celler); 110 Cong. Rec. 1600 (Remarks of Congressman Lindsay); 110 Cong. Rec. 2558 (Remarks of Congressman Goodell); 110 Cong. Rec. 5092 (Remarks of Senator Humphrey).

In the instant case, the Court of Appeals was of the view that § 703(j) is "largely ancient history" and that the failure of Congress to pass an amendment during

the 1972 debates on Title VII, which would have foreclosed all affirmative orders, rendered § 703(j) without any weight. App. "A", p. 40-41. The effect of the Court's opinion is, in our view, to hold § 703(j) impliedly repealed. There is, however, no intention, either express or implied, to repeal a statute by not enacting another statute. See *Morton* v. *Mancari*, 42 U.S.L.W. 4933, 4938 (June 17, 1974).

The issue of court-ordered racial quotas as remedial relief is of great concern to the courts and citizens who are subject to such orders. Should the decisions of the courts below be implemented, official recognition and encouragement of racial discrimination will be effectuated. Before such classifications are allowed to become operable, we believe they deserve the attention of this Court.

IV. The Allowance of Costs of Appeal to Plaintiff N.A.A.C.P. Is Barred by the Eleventh Amendment to the United States Constitution.

In *Edelman* v. *Jordan*, 415 U.S. 651, this Court held the Eleventh Amendment barred an award of retroactive welfare benefits from a state. *Edelman* squarely held that any suit which seeks to impose a liability which must be paid by public funds is barred by the Eleventh Amendment. *Id.* at 651. The only two circuits to consider whether *Edelman* barred costs or attorneys fees from being taxed against a state treasury have viewed the Eleventh Amendment as foreclosing any money award from the state treasury. *Jordan* v. *Gilligan*, 500 F.2d 701, 709 (6 Cir. 1974); *Skehan* v. *Board of Trustees*, No. 73-1613 (3rd Cir. May 3, 1974). The Courts' opinions in those cases recognize the award of costs is a direct levy on a state's general revenues and, additionally, is a form of compensation to the winning party. Since *Ex Parte Young*, 209 U.S. 123, this Court has

only sanctioned equitable orders which have an effect on a state's treasury. In no instance has "compensation" from a state treasury been approved. Clearly, if parties were allowed to reach and apply state property to satisfy money judgments against a state, the command of the Eleventh Amendment would become hollow in every respect.

The award of costs against the Commonwealth of Massachusetts, which is not a party to the proceedings,[10] cannot be satisfied by any Massachusetts official since, pursuant to Mass. Const. Pt. 2, c. 2, § 1, Art. 11, no monies may be issued from the treasury of the Commonwealth without a specific appropriation by the Legislature. There is no appropriation to pay the costs of this case.

The decision of the Court of Appeals with respect to costs creates a conflict between the circuits and should accordingly be reviewed by this Court.

Conclusion

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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[10] To the extent the Commonwealth or a political subdivision thereof is the real party in interest in this case, the Court is without jurisdiction to make any award in the *N.A.A.C.P.* case which was brought under 42 U.S.C. § 1983. *City of Kenosha* v. *Bruno*, 412 U.S. 507; *Moor* v. *County of Alameda*, 411 U.S. 693.

APPENDIX A

United States Court of Appeals

For the First Circuit

No. 74-1067

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,

PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,

DEFENDANTS, APPELLEES.

DIRECTOR AND COMMISSIONERS OF CIVIL SERVICE,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*, McENTEE and CAMPBELL, *Circuit Judges*.

Edward D. Kalman, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *Walter H. Mayo III*, Assistant Attorney General, were on brief, for appellants.

David L. Rose, Attorney, Department of Justice, with whom *J. Stanley Pottinger*, Assistant Attorney General, *James Gabriel*, United States Attorney, and *James M. Fallon*, Attorney, Department of Justice, were on brief, for United States, appellee.

Patrick J. King, with whom *Thomas A. Mela* was on brief, for N.A.A.C.P. et al., appellees.

September 18, 1974

CAMPBELL, *Circuit Judge*. For many years applicants for the position of fire fighter in the cities and towns of Massachusetts have had to pass a written multiple-choice test (the "test") administered by the Massachusetts Division of

Civil Service. The Division appeals from a district court decision holding the test insufficiently related to a fire fighter's duties to justify its disproportionate impact upon black and Spanish surnamed applicants and ordering a preference to be given members of those minorities, in future hiring, to remedy past discrimination. 371 F. Supp. 507 (D. Mass. 1974).

Two actions brought against Boston, its Fire Commissioner and Massachusetts Civil Service officials were consolidated in the district court. The first was brought late in 1972 by the Boston Chapter, N.A.A.C.P., Inc. and by black and Spanish surnamed individuals under 42 U.S.C. §§ 1981, 1983 and the Fourteenth Amendment.[1] Plaintiffs alleged that standards and procedures for recruiting and hiring fire fighters had the foreseeable effect of discouraging minority employment. The test, a swim requirement, and the disqualification of those with felony records were all challenged. A second action was brought early in 1973 by the Attorney General of the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972. Both suits sought not only orders forbidding the challenged practices but also remedial hiring of enough minority individuals to offset past discrimination.

The district court held a hearing at which evidence was introduced concerning the alleged discriminatory hiring practices and the disproportionate racial impact of the test. After the hearing the parties stipulated that it would be treated as one on the merits of the testing issue, but

[1] This was brought and certified as a class action. The first certified class was "All black or Spanish-surnamed persons who have applied for the position or firefighter in any fire department . . . subject to Massachusetts Civil Service law, but have not become eligible for appointment under existing requirements". The other class included all who never applied because they were deprived of information concerning fire fighter employment opportunities.

would cover only the "preliminary injunction stage" of the recruiting challenge. Objections to the felony disqualification and the swim test were not pressed at the hearing, but have not been abandoned. The district court's opinion and judgment enjoined use of the test in its current form, ordered Boston and its Fire Commissioner to engage in additional recruiting of minorities, and awarded minorities a preference in hiring to ameliorate the effects of past discrimination. Boston and its Fire Commissioner took no appeal from the court's adverse rulings.

I

In *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), we held that an employer may use a means of selection having a "racially disproportionate impact" only if he can show "that the means is in fact substantially related to job performance". *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The approach is thus two-pronged: those challenging an employment test must establish its disproportionate impact by demonstrating that, for whatever reason, it is more of a hurdle for minority members than for others: once this is shown, the test's proponents acquire a burden of justification and must "prove that the disproportionate impact was simply the result of a proper test demonstrating lesser ability of black and hispanic candidates to perform the job satisfactorily". *Vulcan Society* v. *CSC*, 490 F.2d 387, 392 (2d Cir. 1973).

Some courts, including the court below, describe the showing plaintiffs must make as a "prima facie case" of "racial discrimination". We use "racially disproportionate impact" because it is a neutral and seemingly more accurate description. A means of selection may disqualify proportionally more minority candidates than others and thus have a racially disproportionate impact, yet not be discrimination in the constitutional sense. In *Castro*, for example, we approved a high school diploma requirement

for police even while recognizing a disparity between blacks and Spanish surnamed candidates and others in respect to a high school education.[2] We thought a high school education was a "bare minimum for successful performance of the policeman's responsibilities". *Castro, supra* at 735. But we disapprove a paper-and-pencil test which also bore more heavily on blacks and Spanish than others because it was not proven "convincingly" that there was a "fit between the qualification and the job". *Id.* at 734.

Plaintiffs usually meet their initial burden by demonstrating that minority candidates have a higher test failure rate; defendants are then put to their proof of job-relatedness. Here, however, the district court found inadequate the only available sampling showing how blacks and Spanish have fared on the test,[3] although it found much evidence that blacks and Spanish have held disproportionately few jobs in the fire departments of the major Massachusetts cities where most of them reside.[4]

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[2] *Cf. Berkelman* v. *Unified School Dist.* No. 73-1686, slip op. pp. 1-6 (9th Cir. July 1, 1974).

[3] Applicants taking the August 1971 test were given the option of identifying their race, color or national origin. 84% did so. Out of 33 individuals self-identified as black or Spanish, 13 or 39% passed. The court felt the statistics were "obviously meager" and declined to find that "in themselves" they established a prima facie case, although, insofar as they went, the statistics showed a disparity, because of 3089 Caucasians, 1737 or 56% passed. *Cf. Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971).

[4] 1970 census figures show that in Boston, with a 1970 black population of over 16%, black fire fighters made up less than 1% of the force; Springfield's black population exceeded 12% but blacks made up less than 0.2% of the force. And, as the district court pointed out, the combined black and Spanish minority in Boston is today probably closer to 23% than to 16%. Cambridge shows a lesser discrepancy, although still a very sizable one. New Bedford and Worcester, with smaller minority populations, reflect the least disparity. Census data as to Spanish surnamed individuals show that nearly 3% of Boston's population, but only 0.1% (two individuals)

Until recently relatively few minority members applied for fire fighting jobs, resulting in a very small sample from which to draw conclusions about their comparative test performance.

The district court concluded that the census figures, especially those for Boston and Springfield, when used "in support of the meager exam statistics", established a prima facie case of the test's discriminatory effect. The court correctly noted that

> "such a finding is not determinative of the issue but merely shifts the burden to the defendant to justify the use of the exam. This is a burden a public employer should not be unwilling to assume." 371 F. Supp. at 514.

We need not decide whether census figures showing a gross disproportionality in the employment of black and Spanish surnamed fire fighters and others are enough, standing alone, to shift the burden of justification to defendants. In *Castro,* when dealing with a relatively innocuous height requirement, we declined to impose a burden of justification upon defendants in the absence of any evidence that the height requirement adversely affected

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of the fire department, fit within that category. Springfield has no Spanish surnamed fire fighters, although Spanish comprise 3.4% of its population. Cambridge, New Bedford and Worcester had substantial disparities.

We find no error in the district court's reliance on statistics pertaining to the cities proper rather than to metropolitan regions. *Cf. Town of Milton* v. *CSC*, 1974 Mass. Adv. Sh. ___, 312 N.E.2d 188. We note that even within the Greater Boston area, with a black population in 1970 or 4.6%, the disparity is substantial; the same is true in Springfield. *See also Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 361 F.Supp. 1293 (D. Mass. 1973), *aff'd*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 1971 (1974).

It would, of course, be unreasonable to expect perfect correlation between ethnic groupings and the holders of a particular job, but when there is only one minority fireman out of 475 in a city like Springfield with a large black or Spanish surnamed population, the imbalance is obvious.

minority candidates. On the other hand, the present test, given for more than half a century, is a far more salient selection device, and it can be argued that a showing of significant disproportionality in minority employment, coupled with even minimal proof of a higher minority failure rate, is enough to shift to the Division of Civil Service the burden of justification.[5] *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Disproportionate impact or prima facie discrimination are simply labels that aid in singling out qualifications which it is reasonable to ask an employer to justify; "complete mathematical certainty" is not required. *Vulcan Society, supra* at 393. When widespread minority underemployment is shown to exist in a given occupation, primary selection devices should not be immunized from study by placing an unrealistically high threshold burden upon those with least access to relevant data. This seems especially so where the small size of the sample may be traceable to the test's discouraging effect as well as to unequal recruitment practices.[6]

But we do not decide on this issue alone. What in our view conclusively tips the scale in plaintiffs' favor is the uncontroverted testimony, from experts called by both

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[5] *Mayor of the City of Philadelphia* v. *Educational Equality League*, 94 S. Ct. 1323 (1974), is not to the contrary. The Court emphasized that in many cases it is proper to infer discriminatory intent or impact from racial statistics. *Id.* at 1333. *See also Fiss, A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 270-81 (1971).

[6] Plaintiffs argue that the vice of the test is as much its tendency to discourage minority members from applying as that minority applicants may be expected to perform less well. If so, this is a reason for not holding the smallness of the sample against plaintiffs. Moreover, the sample of those minorities who do take the test is self-selected; and, for all we know, only especially motivated and competent minority members took the test. The 39% passing rate might be higher than the rate would be from a random sample. In any event where, as here, the minority sample is disproportionately low, it is both dangerous to rely too heavily on the figures and unfair to ignore them entirely.

sides, that black and Spanish surnamed candidates typically perform more poorly on paper-and-pencil tests of this type. *See Cooper & Sobol, Seniority & Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring & Promotions,* 82 Harv. L. Rev. 1589, 1640 (1969). (*Cf. Castro, supra,* where black and Spanish police candidates were shown to have performed more poorly than did whites on a test of similar design.) In light of the expert testimony, we cannot say that the district court was clearly erroneous in its ultimate fact finding that plaintiffs had established a prima facie case.[7] The burden thus shifted to the defendants to justify the test by showing that it was job-related.

That Massachusetts did not intentionally discriminate is immaterial. Title VII proscribes "standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions". *McDonnell Douglas Corp., supra* at 806. *See Griggs, supra* at 431-32. Equitable relief under the Civil Rights Act and the Fourteenth Amendment requires no proof of malice or "fault". "The result, not the specific intent, is what matters". *Rozecki* v. *Gaughan,* 459 F.2d 6, 8 (1st Cir. 1972). *See Inmates of the Suffolk County Jail* v. *Eisenstadt,* 494 F.2d 1196 (1st Cir. 1974), *application for cert, filed,* No. 73-1992 (U.S. July 8, 1974). The question is whether the test denied

[7] Any written test in English would seem obviously harder for persons whose native tongue is Spanish. Other evidence at trial supported the view that the test bore more heavily on minorities. For example, the court found that Boston fire fighters were often recruited by relatives and friends. Minority applicants, lacking access to such sources of aid and advice, might find it harder to absorb the technical subject matter covered in the test. They could try to memorize the "Red Book", but such information is doubtless more easily absorbed by those exposed to firefighters and firehouse routines. Such considerations do not, of course, invalidate the test; they are merely additional reasons for inquiring into its utility as a *bona fide* predictor of job performance.

applicants equal protection of the laws by creating "built-in headwinds" for those who, although qualified to perform the job, cannot pass the test. If it did, the inequality may be remedied without regard to official malice, specific intent, or actionable neglect.[8]

II

The district court found that defendants had not met their burden. The defendants' major task in doing so was to show a substantial relationship between the test results and job performance. A test fashioned from materials pertaining to the job (here, from a preliminary fire fighters' manual) superficially may seem job-related. But what is at issue is whether it demonstrably selects people who will perform better the required on-the-job behaviors after they have been hired and trained. The crucial fit is not between test and job lexicon, but between the test and job performance.

In fairness to the state, we must not forget that civil service tests were instituted to replace the evils of a subjective hiring process. Little will be gained by minorities if courts so discourage the use of tests that the doors to political selection are reopened. Moreover, a test, even one the cutoff of which does not demonstrably predict job performance, may serve worthwhile goals in gross by sifting from the pool of potential applicants those without enough motivation even to try to acquire the skills the test demands, and by discarding some few candidates who take the test but whose mental ability is so low that they are obviously unsuitable. Finally, it is virtually impossible for an employer to justify to a mathematical certainty every selection device. Controlled experiments in which applicants are hired without regard to their test scores

[8] The standard would, of course, be different were we considering a damages award against individual officials. *Cf. Palmigiano* v. *Mullen*, 491 F.2d 978, 980 (1st Cir. 1974).

may be impractical in many cases, and so those who fail the test often are not available to be evaluated on the job. If they are not, it is impossible to prove that they would have performed less competently.

Nonetheless, we think that the judgment of the district court is amply supported by the record, and we agree with it. Too many doubts persists concerning the validity of this test, the format of which has persisted for years, to make a convincing case for its unaltered use in fire departments notable for the absence of minority employees. Although perfect tests are goals as illusory as perfect schools or perfect courts, the evidence justifies compelling defendants to attempt to fashion a more sensitive test, one that will not needlessly serve as a "built-in headwind" to competent minority members, depriving both them and the Commonwealth of an opportunity for which they are qualified.

The test in recent years has had two parts, one of twenty-five questions covering current events, spelling, vocabulary and arithmetic, and the other of seventy-five questions taken verbatim from the "Red Book", a fire fighter's preliminary manual available from state officials. A score of 70 is required for qualification.[9] Some ques-

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[9] Applicants with a score of 70 or above were rated for prior training and experience, and this rating was incorporated into a composite rating. The composite was determined 70% by the test and 30% by the training and experience score. A composite score under 70 resulted in rejection. Thereafter the applicant was required to pass a medical, meet certain strength requirements, and demonstrate good moral character (including an absence of felony convictions). Applicants meeting these further requirements are then ranked by their composite scores from 100 down to 70. However, disabled veterans are ranked ahead of veterans, and veterans ahead of non-veterans regardless of score. The list of eligibles thus created continues in force until exhausted or for two years. Previous lists have all expired by exhaustion when all eligibles were offered positions.

Localities may set their own additional education and residence requirements. Fifteen departments, not including Boston, require a high school diploma or equivalency. All localities require the applicant to be a resident.

tions calls for considerable verbal skill: an applicant is asked whether "condense" means "(a) conduct (b) expand (c) evaporate (d) contract" and to recognize that "pressurised" rather than "buoyancy" was misspelled. The second part asks questions such as: "the name given to the fire fighter who carries the play pipe end of a hose up the ladder is (a) engineman (b) pumpman (c) nozzleman (d) hoseman". In some instances, questions on the second part required knowledge of apparently obsolete equipment.

The test was not professionally developed. The civil service examiner who wrote the latest versions was without professional training in employment or psychological testing, and did not consult with anyone who had such training. No analysis of required job skills was conducted, and the author (who was not skilled in fire fighting) relied on the civil service "poster" setting forth the principal "duties" of a fire fighter, and on the Red Book. After a test was given, civil service personnel would analyze 50 to 100 answer sheets and, in later versions, eliminate questions that were too easy (because most people got them right) or too hard (because most answers were wrong).[10] The "passing" score of 70 was selected arbitrarily, without reference to the expected or actual distribution of scores.

The general questions in the first part of the test have nothing to do with fire fighting, and plaintiffs' expert[11]

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[10] Because the questions often changed it seems possible that the same person in successive administrations of the test would not receive the same or a comparable score. This is a problem in testing even when the questions are constant. *See* American Psychological Ass'n, Standards for Educational and Psychological Tests & Manuals 25-32 (1966), incorporated by reference in EEOC Guidelines, 29 C.F.R. § 1607.5(a). No reliability study of the tests has ever been conducted.

[11] The district court committed no abuse of discretion in permitting plaintiffs' expert to testify. She was a psychologist with distinguished

was of the opinion that they were not useful even as an index of general intelligence. Defendants may plan to delete such questions in the future; in any event, unless the correlations discussed below between the overall test scores and the performance of certain groups of tasks by selected fire fighters may be said to validate the first-part questions, there is no evidence at all that they are job-related.

The second-part questions deal with fire fighting, yet there is a difference between memorizing (or absorbing through past experience) fire fighting terminology and being a good fire fighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary the team might acquire authorities like the late John Kiernan but no one who could bat, pitch or catch. The test does not examine traits seemingly more relevant to a fire fighter's performance such as agility, stamina, quick thinking under pressure, poise, mechanical aptitude and the ability to work with others. Experts for both sides agreed that verbal memory is not a very important attribute for the job. And unlike the motor vehicle rules covered in a driver's test, it seems unessential whether the candidate absorbs the tested vocabulary before or after acceptance. Nomenclature and similar matters can be masfered during training and on the job. Testing them before acceptance puts a premium on ability to memorize terms that, at the time, contain only abstract meaning.

Because the test measures a type of achievement not especially relevant to the job, one would not expect it to predict job success. It may be, however, that neither the

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credentials who was engaged in a fire fighters' test validation study. The qualifications of experts are largely matters within the district court's discretion. *See Texas Instruments, Inc. v. Branch Motor Express Co.*, 432 F.2d 554, 556 (1st Cir. 1970).

test designer nor the court can understand how the score on the test successfully predicts. Perhaps, for example, the questions about machines are indirect indicators of mechanical aptitude. Recognizing these possibilities, the district court felt that careful scrutiny of any claimed predictive value was in order. We agree, and now seek to answer whether, against all odds, the test has been shown to be an actual predictor of on-the-job success.

Defendants attempted to establish job-relatedness through an expert engaged to conduct a validation study. *See generally* the test validation Guidelines of the EEOC, 29 C.F.R. § 1607. The expert stated that, in his opinion, his study established that the test was valid under the Guidelines which, according to *Griggs, supra* at 434, should be treated as "expressing the will of Congress".

The validation study conducted by defendants' expert had two parts. The first part sampled "objective" measures of job performance, such as all of the chores involved in raising a ladder and properly evolving the fire hose and its connections. These chores were further broken down into discrete components, and observers of the test subjects' performance gave either credit or no credit for each component. The total score of each subject was then added and compared to his test score both on an overall basis and on a chore-by-chore basis. It was found that the performance on the test "predicted" (was correlated to) the performance scores on a number of the chores.

The second part of the validation study involved rating of fire fighters by their superiors on twelve "subjective" performance scales, including such diverse measures as "holding up under pressure" and "overall job effectiveness". None of these twelve scales, nor the combination

of the twelve scales together, correlated significantly to the score on the test.[12]

Defendants' expert contended that the test was valid in spite of its failure to correlate to the overall measures of job performance, and suggested that the Guidelines were satisfied by the statistically significant correlation between the test and two of the object measures.[13] The district court, however, concluded that the correlations were "barely significant" and concluded that defendants had not demonstrated that the test was "in fact substantially related to job performance". It stated that:

> "The fact that only two . . . significant correlations were found between the exam and components of job performance — components which represent only a fraction of those duties a firefighter encounters — and the fact that those correlations were only minimally significant does not constitute 'convincing' evidence of job-relatedness." 371 F.Supp. at 517-18.

The district court's conclusion was not erroneous. Substantial doubt is cast on the test's validity by its failure to correlate at all with any of the subjective ratings or

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[12] The correlation between the test and all supervisory ratings was $r = 0.078$. Were this statistically significant, it would indicate that the grade "explained" only approximately 0.6% of all observed variance in fire fighters' on-the-job performance.

[13] The objective portion of the study produced several correlations that were statistically significant (likely to occur by chance in fewer than five of one hundred similar cases) and practically significant (correlation of $\pm$ 0.3 or higher, thus explaining 9% or more of the observed variation). Of the seven statistically significant correlations, four were not practically significant. Of the remaining three correlations, only two were correlations between the test and an objective measure; the third was a correlation between the composite mark and an objective measure.

Defendants' expert also found that there was no statistically or practically significant correlation between test scores and all objective criteria taken together.

Thus of all possible measures, the test score produced a meaningful correlation only to air mask operation and to the subject's performance as loop man in the evolution of the hose line.

with the overall objective ratings. Only two of the tasks on the objective portion of the study correlated with the test, and the correlation there was not impressive. These rather meager signs of validity do not convince us, nor did they convince the district court, that the test is, as *Castro* demanded, "substantially related to job performance". The state has not come forward with "convincing facts establishing a fit between the qualification and the job". *Id.* at 732. We do not think the district court was bound to find either compliance with the Guidelines or "job-relatedness" in a more general sense. The Guidelines are not satisfied by just any correlation to any facet of job performance. They require close scrutiny of "the use of a single test as a sole selection device . . . when that test is valid against only one component of job performance". § 1607.5(c). The test here, and the validation study performed by defendants' expert, do not survive close scrutiny.

We have already indicated several difficulties with the test: it was not professionally developed; its content does not appear to be job related; the cutoff score of 70 is arbitrary; the validation study reveals no correlation to overall measures; either subjective or objective, and only minimal correlation to two individual objective tasks. Another significant defect in the evaluation—a defect that from defendants' point of view is perhaps unavoidable, although see Guidelines § 1607.9(b)—is that the groups evaluated consisted entirely of fire fighters who had passed the test. No one who had received a score lower than 70 was included. The validation study was therefore "concurrent" rather than the more useful "predictive" type. *See United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (validation study unacceptable because concurrent). Since no one scoring less than 70 was evaluated, there is no evidence that those failing would be less

capable as fire fighters than those passing. Although there is probably some score that would reflect substantially deficient motivation or ability to understand or communicate, so that such an applicant would be unsuitable even for a job that does not emphasize paper-and-pencil skills, we do not know where that point may be.

The data which the study did produce is said to reveal that fire fighters who passed and got high scores were superior in a few ways to fire fighters who passed with lower scores. We are then asked to infer that applicants who fail the test would have performed the same tasks more poorly still. The inference is a difficult one to draw. A very high passing score might indicate a special motivation or knowledge. On the other hand, the differences reflected by test scores in the range of 50 to 80 might be altogether negligible. We cannot tell. But a correlation within the range of 70 to 100 can easily be produced by data that would indicate no significance in differences in the 50 to 70 range. Particularly when the data are concurrent, the correlations should be more striking than they were here.[14]

We also find it significant that the defendants never attempted to demonstrate that alternatives to the test are unavailable. The Guidelines require such proof, § 1607.3. In its absence, we hesitate to approve a test of racially disproportionate impact and slight, if any, validity.

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[14] Another way to make the same point is to say that a test should be valid for the purpose for which it is used. Apparently nearly all those who score over 70 and are placed on an eligibles list are eventually offered employment. Thus, the test is not chiefly used to choose between a score of 70 and a score of 95, and it is not particularly helpful to know that the applicant with a score of 95 is apt to excel. The test's main use is to choose between the applicant with, for example, a 65 and the applicant with a 71; but because the validation study is concurrent, we do not know whether it is valid in that range.

Finally, although we do not find them necessary to the result we reach here, we have doubts about the way in which the validation study was performed. The sample for the study was selected from a single administration of the test. But on average those hired for civil service jobs are selected in their order on the roster of eligibles, which is ranked from highest to lowest (with the exception of veterans) in test score. From any given list the highest ranking persons have been hired the earliest. Therefore the sample for the study would seem biased; those with higher scores also had additional experience on the job. Could it be that the few observed correlations are explained by on-the-job experience rather than test score?

Moreover, no attempt was made to explain the effects, if any, of filtering that occurred even after the examination. Those who passed the test, but would have made poor fire fighters, may have been filtered from the sample by the time of the study, because of voluntary resignations, release for unsuitability in training or on the job, failure of the physical, etc. Those remaining in the sample of the study are a select group indeed, while those who failed the test but would perhaps have made good fire fighters are entirely missing from the sample.

Even if the test is minimally valid, we might also doubt its use as an absolute cutoff. A test seemingly should receive no more weight in the selection process than its validity warrants. Use of a minimally valid test as an absolute cutoff is questionable even if more limited uses of the test are acceptable.

Finally, no effort has been made to include minorities in the sample of the study. The Guidelines so require, §§ 1607.4(a), 1607.5(b)(5). The *Georgia Power* court has agreed. The challenge leveled at the test is that it has a disproportionate and unwarranted impact on minority group members; it is difficult to quantify this impact—or

to disprove it—unless some of those who were allegedly adversely affected are included in the study. We understand the practical difficulties, particularly in a job population almost devoid of minorities. But we urge that consideration at least be given to the problem as a new test is evolved.

There are, in sum, too many problems with the test for use to approve it here. The district court was correct in ruling that defendants had not discharged their burden.

III

There remains for discussion the remedy selected by the district court. In *Castro* we required the district court, as a means of ameliorating the continuing effects of past discrimination, to institute a program of color-conscious relief that included priority pooling of minorities, with choices made from the priority pool until it was exhausted. *See* 365 F.Supp. 655 (D. Mass. 1973) (consent decree on remand).

The relief ordered in the instant case follows this pattern. The court first enjoined use of the eligible list from the most recent test and enjoined any further administration of any similar test until it was validated. This was the proper course under our decision in *Castro*. *Cf. Vulcan Society, supra; Bridgeport Guardians, Inc.* v. *Bridgeport CSC*, 482 F.2d 1333 (2d Cir. 1973). The court then created four eligibility groups: in Group A will be all black and Spanish surnamed persons applicants who took and failed any previous test, but who pass any new and valid test.[15] In Group B are all persons on the current eligibility list. Group C will contain all black and Spanish

[15] Group A shares with Groups C and D the criteria of passing a new and valid test. It is possible that no such satisfactory examination can be devised and validated within a reasonable time. If this should occur, the district court may of course amend the decree, should a party so request, to provide for placement into groups based on alternative non-discriminatory criteria.

surnamed persons who do not belong in Group A but who pass a new examination and are otherwise qualified. Group D will be composed of all other persons who pass the new examination. Any Massachusetts community subject to the Civil Service law and having a minority population of one percent or more must submit requisitions to the Division of Civil Service for any fire fighter openings they may seek to fill. The Division is then to certify candidates to such departments by means of a matching procedure designed to ensure that each Group receives proportional representation in accordance with their qualifications. Groups A and B are to be given intial preference on a one-to-one basis, and the other Groups are to be drawn upon as A and B are exhausted. The ratios to be implemented for Boston and Springfield are slightly different than those for the rest of the state, in recognition of their larger minority populations. In all cases, new eligibility lists from successive entrance tests shall be used to replenish Groups C and D. The decree remains in force, for each local fire department, until that department attains sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the locality. After that point the locality is freed from the decree and may make appointments on any nondiscriminatory basis. In no case must any unqualified minority person be appointed; if no qualified applicants are available, none will be appointed.[16]

Defendants contend that the color-conscious relief imposed by the district court is unconstitutional. The argument is without merit. The relief goes no further than

[16] Nor will the order result in the firing of those who have received provisional appointments pursuant to the current, but now invalid, eligibility list. Those temporary appointees will be placed at the top of the Group B list, and their appointments made permanent on a one-to-one basis with permanent appointments from Groups A and C. None will be fired.

to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities.[17] This court has stated:

> "[I]t would be consistent with the goal of equal opportunity to give first priority to members of a minority that had previously been denied equal opportunity, if those members were otherwise as qualified as were qualified members of the majority population." *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 1971 (1974).

See also, e.g., Morrow v. *Crisler*, 491 F.2d 1053 (5th Cir. *en banc* 1974) (withholding quota relief is abuse of discretion); *NAACP* v. *Allen*, 493 F.2d 614, 618-20, nn. 7-10 (5th Cir. 1974) (collecting cases); *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, No. 73-1567 (6th Cir. June 11, 1974); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. *en banc* 1974); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, No. 73-2110 (2d Cir. June 24, 1974). The goal of color blindness, so important to our society in the long run, does not mean looking at the world through glasses that see no color; it means only that all colors are moral equavilents, to be treated on an equal basis. We believe that our society is well served by taking into account color in the fashion used, and carefully limited in extent and duration, by the district court.

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[17] Theoretically it might be possible for defendants to demonstrate that, even though the test has an unjustified racially disproportionate impact, the disparity in resulting employment is primarily accounted for by neutral means. In the case of many northern cities, this could come about because blacks and Spanish surnamed individuals had arrived in Boston in large numbers only in recent years, so that those fire fighters hired prior to the recent increase in minority population were "justifiably" predominantly white. The data support the contrary hypothesis, however. In spite of the increased percentage of minorities in the Boston area, the Boston Fire Department has since 1960 appointed 805 fire fighters, only six (0.745%) of whom were black, and two (0.248%) of whom were Spanish surnamed.

Defendants next contend that, even if the use of color-conscious relief is not forbidden by the Constitution, it is prohibited by Title VII itself, which states in § 703(j), 42 U.S.C. § 2000e-2(j):

> "Nothing contained in [Title VII] shall be interpreted to require . . . preferential treatment to any individual . . . because of race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number of [sic] percentage of persons of such race, color, religion, sex, or national origin in any community . . . ."

Defendants contend in effect that, whatever may be the case when a court undertakes to correct the continuing effects of previous intentional racial discrimination, § 703(j) conclusively withdraws from the district court the power to grant color-conscious relief when the discrimination is unintentional. Although this argument has recently found eloquent support in the dissent of Judge Paul Hays in *Rios, supra*, we do not accept it.[18] We agree with the majority in *Rios* that relief undertaken in order to redress past discrimination, whether or not intentional, is permitted. Section 703(j) deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer. And the dispute over the intent of the framers of Title VII is largely

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[18] *Compare* Blumrosen, *Strangers in Paradise: Griggs* v. *Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59 (1972), *with* Wilson, *A Second Look at Griggs* v. *Duke Power Company: Ruminations on Job Testing, Discrimination & The Role of the Federal Courts*, 58 Va. L. Rev. 844 (1972); *Developments in the Law — Employment Discrimination & Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971); Note, *Employment Testing: The Aftermath of Griggs* v. *Duke Power Company*, 72 Colum. L. Rev. 900 (1972).

ancient history.[19] *See generally* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 732 (1972). Title VII was amended in 1972 and the legislative debates at that time, particularly the failure of Congress to pass the Dent Amendment, which would have foreclosed all affirmative action plans and racial balance relief, lend support to an inference that Congress ratified the power of the courts to impose color-conscious relief of the sort that had been approved in several cases at the time the attempts to amend the amendments to Title VII failed. For the history of this episode, *see id.* at 747-60. We believe that the history of the 1971-72 amendments, and failures to amend, together with the weight of judicial authority, warrant our rejection of defendants' Title VII claim.

The other arguments raised by defendants have been examined and found to be without merit. The judgment is *Affirmed.*

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[19] In the context of this suit the dispute might also be an unnecessary one. Only the suit by the United States is brought under Title VII. The NAACP's § 1893 suit may be completely free of whatever limitations Title VII may contain. In any case, there is no need for us to decide the matter here.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1067

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,

PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,

DEFENDANTS, APPELLANTS.

DIRECTOR AND COMMISSIONERS OF CIVIL SERVICE,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ON MOTION IN OPPOSITION TO TAXATION OF COURT COSTS

Before COFFIN, *Chief Judge*, McENTEE and CAMPBELL, *Circuit Judges*.

Edward D. Kalman, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *Walter H. Mayo III*, Assistant Attorney General, were on brief, for appellants.

David L. Rose, Attorney, Department of Justice, with whom *J. Stanley Pottinger*, Assistant Attorney General, *James Gabriel*, United States Attorney, and *James M. Fallon*, Attorney, Department of Justice, were on brief, for United States, appellee.

Patrick J. King, with whom *Thomas A. Mela* was on brief, for N.A.A.C.P. et al., appellees.

November 8, 1974

PER CURIAM. In *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, No. 74-1067 (1st Cir. Sept. 18, 1974), this court

affirmed the district court's decision, 371 F. Supp. 507 (D. Mass. 1974), finding a state-administered entrance examination for firemen to have a racially discriminatory impact, and ordering injunctive relief. Under Rule 39(a) of the Federal Rules of Appellate Procedure, costs of appeal are to be taxed against the losing party unless otherwise ordered. Appellees N.A.A.C.P. et al. filed a bill of costs for $49.50, and appellants director and commissioners of the state civil service division oppose a taxation of these costs against them on the ground that it would constitute an award of money against the state in violation of the eleventh amendment. While the amount in controversy here is relatively insignificant, the issue raised is of importance to the everyday practice before the federal courts.

Appellants rely on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), in which the Supreme Court held that the eleventh amendment barred a federal district court from awarding retroactive benefits under a federal-state public aid program. The Court in *Edelman distinguished* what it found in effect to be a money judgment payable out of the state treasury directly, from the prospective injunction upheld in *Ex Parte Young*, 209 U.S. 123 (1908), even though in the latter case the necessity for state officials to shape their conduct to the Court's mandate might have had a substantial "ancilliary effect" on the state treasury. 415 U.S. at 668. Since *Edelman*, courts of appeals have divided on whether a federal court may award attorneys' fees against an unconsenting state, an issue which is analytically similar to the question of awards of costs. An award of attorneys' fees was upheld in *Class* v. *Norton*, No. 74-1702 (2d Cir. Oct. 10, 1974). Before *Edelman*, the same result was reached in *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), and in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd mem.*, 409 U.S. 942 (1973). However,

two other courts of appeals, attaching little precedential weight to the Supreme Court's summary affirmance without opinion in *Sims*, have cited *Edelman* as requiring the contrary conclusion. *Jordan* v. *Gilligan*, 43 U.S.L.W. 2058 (6th Cir. July 18, 1974); *Skehan* v. *Board of Trustees*, No. 73-1613 (3d Cir. May 3, 1974).

As the Court in *Edelman* observed, 415 U.S. at 667, the line between permissible relief and that barred by the eleventh amendment will not always be clear. And we acknowledge that an award of court costs cannot be neatly categorized as either prospective or retroactive. An award of costs does operate as a direct levy on the state's general revenues and as a form of compensation to the winning party. On the other hand, costs are not awarded for accrued liability, but rather are assessed for certain litigation expenses in accordance with the generally mechanical provisions of Rule 39. The precise purposes behind this rule and the prior traditional practice of taxing costs are not clear, but no doubt an award to some degree serves to discourage litigiousness and frivolous claims, as well as to induce compliance with the rulings of the court. In this sense allocation of costs is an incident to the court's jurisdiction and judgment in the main action.

In *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1928), there is support for the view that the power to tax court costs is to be characterized as an incident to the hearing and not within the scope of a state's sovereign immunity if the federal court's exercise of jurisdiction over the state party in the action in the main is valid. The Court in *Fairmont* held that sovereign immunity did not protect a state against a judgment for costs in litigation before the Supreme Court on an appeal from the final judgment of the highest state court. While acknowledging that a sovereign is immune from costs awarded by its own courts, the Court stated that a state loses some of

its sovereign character when it is forced to appear before the Supreme Court under the Supremacy Clause on a matter of federal and constitutional law. According to the Court the "incidents of the hearing are those which attach to the regular jurisdiction of this Court," and the awarding of costs was one such incident that had been "the invariable practice" in judgments against a state in both civil and criminal cases before that Court. *Id.* at 70. Courts in this circuit have awarded costs and attorneys' fees against state officials when the state was the real party in interest. *E.g., Hoitt* v. *Vitek*, 361 F. Supp. 1238, 1255 (D.N.H. 1973), *aff'd*, 495 F.2d 219 (1st Cir. 1974).

In view of the above considerations and precedents, we conclude that the eleventh amendment does not immunize appellants from being taxed for costs.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-3060-F

BOSTON CHAPTER, NAACP, INC., ET AL.

v.

NANCY B. BEECHER ET AL.

Civil Action No. 73-269-F

UNITED STATES OF AMERICA

v.

CITY OF BOSTON ET AL.

OPINION

February 8, 1974

FREEDMAN, D.J.

These cases allege discriminatory practices on the part of the defendants in their qualification requirements and overall hiring policies for the position of firefighter in the City of Boston, in particular, and in other cities and towns of the Commonwealth of Massachusetts subject to state Civil Service law. Because of the identity of the issues involved and relief sought, the two cases were consolidated by the Court with the assent of the parties. *United States* v. *City of Boston et al.* is brought by the Attorney General to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, (Pub.L. 92-261, March 24, 1972), and pursuant to 42 U.S.C. §§1981, 1983 for alleged deprivations of constitutionally protected rights. The plaintiff United States alleges discriminatory practices against blacks and Spanish-surnamed persons in recruitment policies, in the

utilization of non-job predictive tests and qualifications which have a detrimental impact on blacks and Spanish-surnamed persons, and in the refusal to remedy those practices and correct the present effects of past racially discriminatory policies and practices. Plaintiff prays that the defendants be enjoined from continuing these alleged policies and ordered to conduct a meaningful minority recruitment program and to hire sufficient blacks and Spanish-surnamed persons to overcome the effects of alleged past discrimination. The Attorney General also seeks monetary compensation for the loss suffered by those minority persons who were denied employment opportunity because of the alleged discriminatory practices.

Boston Chapter, NAACP, Inc., et al. v. *Beecher et al.* is brought as a class action. The cause of action is said to arise pursuant to 42 U.S.C. §§1981, 1983 and 28 U.S.C. §§2201, 2202. Plaintiffs allege discrimination in defendants' policies of recruiting and in their use of allegedly discriminatory selection procedures including the written exam, the swim test, and use of police records. The relief requested is similar to that prayed for in the companion case, including the imposition of a one to one hiring ratio and attorneys' fees.

Certification of a Class

Pursuant to F.R.C.P. 23(c)(1), the Court has ordered that Civil Action No. 72-3060-F be maintained as a class action. The following classes have been certified:

1. All black or Spanish-surnamed persons who have applied for the position of firefighter in any fire department in the Commonwealth of Massachusetts subject to Massachusetts Civil Service law, but have not become eligible for appointment under existing requirements.

(2) All black or Spanish-surnamed persons who have never applied for the position of firefighter because they have allegedly been deprived of information concerning firefighter employment opportunities as a result of the allegedly discriminatory recruitment practices of the defendants.

Class (2) is represented by plaintiff Howard. Class (1) is represented by all other named plaintiffs.

Procedural Posture

Evidence was heard on plaintiffs' request for preliminary relief including evidence on defendants' overall recruiting and testing practices on July 30, 1973 and September 11-17, 1973. It was agreed by the parties that the hearing for preliminary relief would be treated as a trial on the merits, pursuant to Rule 65(a)(2), as to the written examination only. The issue of recruitment remained at the preliminary injunction stage. The issues of the swim test requirement and use of police records were not raised at this posture.

Partly as the result of a self-imposed freeze and partly on instructions from the Court, the Massachusetts Division of Civil Service (MDCS) has not certified for appointment individuals from the currently existing Civil Service eligible list for the fire service in Boston, Springfield, Worcester, Cambridge, or New Bedford, since the commencement of these actions. By order of the Court, however, MDCS was allowed to certify twenty (20) individuals for the fire service in Boston after the Court determined that an emergency situation existed in that city.

Present Hiring Procedure

The following facts have been stipulated to by the parties.

Nancy B. Beecher, Joseph M. Duffy, Richard J. Healey, Wayne Budd, and Helen C. Mitchell are the members of the Massachusetts Civil Service Commission and they are

charged with the setting of policy for the Division of Civil Service. From January 22, 1968 to April 5, 1973, Mabel A. Campbell was Director of Civil Service and responsible for the administration and operation of the Division of Civil Service, including administering written examinations, medical examinations, strength requirements, and determining the good moral character of all persons seeking employment in the fire services in all cities (39) and in 68 towns in Massachusetts, including Boston. In addition, Ms. Campbell established eligibility lists and certified eligible individuals to those fire departments.

The Director of Civil Service, upon request of a city or town, establishes education requirements pursuant to the provisions of M.G.L. c. 31 §6A. Approximately 15 fire departments, not including the Boston Fire Department, require applicants to have a high school diploma or an equivalency certificate issued by the Massachusetts Department of Education. All other fire departments, including Boston, have no education requirements. The Director of Civil Service has been required by state law (M.G.L. c. 31 §2A(m)) to establish a recruitment program to recruit persons to fill vacancies for officers and positions in the classified civil service, including firefighters, since March 1968. The responsibility of the Director of Civil Service to establish or conduct a recruitment program is subject to and dependent upon receiving sufficient funds for recruitment purposes through appropriations of the Massachusetts legislature. William McRell has been acting Director of the Division of Civil Service from April 5, 1973 to date.

The present Civil Service eligibility requirements for applicants for the position of firefighter in all cities (39) and 68 towns of the Commonwealth are as follows:

a) age 19 to 35 years of age;
b) no height requirements;
c) no weight requirements;
d) good moral character;
e) high school diploma or equivalency certificate required when requested by a city or town; and
f) average physical requirements.[1]

The written examination for firefighter for all cities and towns in Massachusetts, including Boston, contain two parts. The first section is composed of 25 questions of a general intelligence nature. Each answer in Section I is worth 1 point. The second section contains 75 questions which are taken from the "Red Book." Each answer in Section II is worth 1 point. This type of examination has been given for at least the last twenty years. Of the 25 questions in the general intelligence section of the written examination there are approximately six questions from each of the four areas of arithmetic, spelling, vocabulary, and general knowledge, and an occasional question on current events or civics. The "Red Book" is a Fire Manual for the Instruction of Applicants for Entrance Examinations in the Fire Service in cities and towns of the Commonwealth of Massachusetts prepared by the Massachusetts Division of Civil Service. This book has been in circulation for at least 20 years. The latest publication of the manual was March 3, 1972.

Applicants who achieve a passing score of 70 of the written examination, referred to above, are then evaluated

[1] Pursuant to Massachusetts state law certain cities and towns, including Boston, have residency requirements for firefighter service. There is some uncertainty as to the present effectiveness of such requirements in the Commonwealth as of this date. However, this Court notes that the Massachusetts Superior Court has recently overruled an opinion of the Attorney General for the Commonwealth and has determined that such requirements do exist, are valid, and must be followed.

for their prior training and experience and rated on a scale of 70 to 100. The final score for each candidate is a composite of 70% of the written examination score and 30% of the training and experience score. But one must achieve a passing score of 70 on the written examination to have his training and experience evaluated. Those applicants who have a total composite score of both the written examination and the training and experience over 70, must then pass a medical examination, meet certain strength requirements and the good moral character requirement. There are no points awarded nor is the total composite score affected in any way by these requirements; however, if a candidate does not meet any of these three requirements, he is not eligible for certification. Applicants who pass the written examination and fail any other requirement may pass those requirements anytime during the life of the eligibility list and have their name placed on said list. The final composite score is expressed to the second decimal place, i.e., "84.26." Disabled veterans are then placed on the list (100 down to 70), followed by veterans (100 down to 70), who are then followed by non-veterans (100 down to 70). Within six months of the date of the written examination, the Division of Civil Service establishes an eligibility list, and that list exists for a maximum of 2 years, at which time it expires by operation of state law, or the list expires by virtue of its exhaustion within that period of time. Every firefighter eligibility list for Boston prior to the current one, which was established in April 1972, has expired by virtue of its exhaustion.

In August 1971, the Division of Civil Service administered a statewide firefighter entrance examination, and with the approval of the Massachusetts Commission Against Discrimination, all applicants taking the examination were given the option of identifying their race, color or national

origin. A three-page computer compilation of the results of the racial classification of applicants taking that examination revealed that 84% (3181/3790) of all applicants responded to one or more categories of the information requested, relative to race, color or national origin. On the current eligibility list for Boston, established on April 4, 1972, following the written examination of August 1971, there are presently more than 236 individuals; in addition, approximately 98 have already been appointed.

The City of Boston is a municipal corporation incorporated pursuant to the laws of the Commonwealth of Massachusetts and is a political subdivision of Massachusetts. The City of Boston is an employer within the meaning of 42 U.S.C. 2000e(b), as amended. The City of Boston maintains and operates a fire department for the prevention and suppression of fires within its city limits. James D. Kelly is the Commissioner of the Boston Fire Department. In that capacity, he is responsible for the administration and operation of the Boston Fire Department including filling firefighter positions and assigning firemen within the department. Applicants to the Boston Fire Department currently must meet the following requirements:

a) age 19 to 35 years of age;
   [Prior to 1971 the minimum age was 21.]
b) no height or weight requirements;
c) good moral character;
d) no specific education requirements; and
e) average physical requirements.

In order to become eligible for appointment to the Boston Fire Department, an applicant must meet the requirements as administered by the Massachusetts Division of Civil Service.

Each of the four Boston firefighter eligibility lists established as a result of the examinations administered in August 1968, September 1969, January 1970, and Septem-

ber 1970 has expired, and each list was exhausted by the appointment of every individual on the list willing to accept appointment except for two or three candidates. Since January 1, 1969, Commissioner Kelly, appointing authority of the Boston Fire Department, has hired 454 individuals. Persons appointed to firefighter positions in the Boston Fire Department are required to complete a training program of approximately eight weeks at the Boston Fire Academy. Failure to satisfactorily complete that program is ground for terminating a trainee's employment. Persons appointed to the firefighter position in the Boston Fire Department serve a probationary period of six months in accordance with Massachusetts Civil Service law. Performance which is not satisfactory to the appointing authority is ground for terminating a probationary firefighter's employment, in accordance with Civil Service law.

Burden of Proof

It is generally accepted that where racial discrimination is alleged, the plaintiff must first establish a prima facie case of discrimination. If that is established, the burden shifts to the defendant to justify the challenged procedures. The duty of the Court in such cases has been outlined by the Court of Appeals for this Circuit in *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir., 1972). That case involved similar issues relating to hiring procedures for the police departments in the Commonwealth. At page 732, the Court stated:

> "In the general course, a court faced with a claimed denial of equal protection must first ascertain whether the plaintiff has made such a threshold showing as to require a justification, must then identify the classification employed, and must finally determine whether the classification has been justified under governing standards."

In determining whether a plaintiff has made a "threshold showing" of discrimination, this judge has previously accepted statistical evidence of racial imbalance as sufficient to establish such a showing, or, to put it otherwise, as sufficient to establish a prima facie case of past racial discrimination. See *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 361 F. Supp. 1293, 1299 (D.Mass., 1973); aff'd. CCA First Circuit, No. 73-1250 (Nov. 30, 1973), p. 15, fn. 15, and cases cited therein. In that case, a significant disparity between the minority population percentage in the City of Boston and the percentage of minorities employed in the construction trades in the Boston area was found to be sufficient to establish a prima facie case of racial discrimination on the part of the construction industry. In cases where a public employer's selection test is being challenged, however, most courts, in finding a prima facie case has been established, have relied on more than a comparison of population and employment statistics. Usually there has been reliable statistical evidence on the percentage of minorities who pass the exam in question as compared with the percentage of whites who pass the same exam. A significant disparity between such statistics showing that minorities pass at a lower ratio than whites has been held to establish a prima facie case that the exam is discriminatory. See *Bridgeport Guardians, Inc. et al.* v. *Members of the Bridgeport Civil Service Comm. et al.*, 482 F.2d 1333, 1335-1336 (2nd Cir., 1973); *Castro* v. *Beecher*, 459 F.2d at 729; *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1171 (2nd Cir., 1972); *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, 1089-1090 (E.D. Penn., 1972). Often the Courts have supported these statistics by referring to a comparison of population and employment statistics, [*Bridgeport Guardians, supra*, at 1335; *Castro* v. *Beecher*, 334 F. Supp., at 935-936.] and a few courts have appeared to rely

almost exclusively on the latter type of statistical comparison. See *Carter* v. *Gallagher*, *E.P.D. ¶8205 (1971), aff'd. 452 F.2d 315, 323 (8th Cir., 1971); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721 (1972); *Western Addition Community Organization* v. *Alioto*, 330 F. Supp. 536, 539 (N.D. Cal., 1971).

As noted previously, applicants taking the August 1971 exam were given the option of identifying their race, color or national origin. Some 84% responded and statistics were compiled as a result thereof. Of the 15 persons who identified themselves as Negroid, eight passed for a figure of approximately 54%. Of the 3,089 applicants identified as Caucasian, 1737 or approximately 56% passed. Eighteen applicants identified themselves as blacks with eight passing or approximately 44.5%, as opposed to a 55% passing rate for those identified as white. Fifteen identified themselves as of Spanish origin. Five passed for a 33.3% passing rate. The combined black and Spanish-origin passing rate was 39%. Plaintiffs suggest these statistics are sufficient to establish a prima facie case that the exam discriminates against blacks and Spanish-surnamed persons. The Court is not impressed by such obviously meager statistics although it does recognize that some courts have indeed relied on such unconvincing statistics. The District Court in *Carter* v. *Gallagher*, 3 E.P.D. ¶8205 (1971), based a prima facie finding of discrimination on statistics which showed that over a 20-year period 22 blacks took the exam and 6 passed for a 27.27 percentage. In *Fowler* v. *Schwarzwalder*, 348 F. Supp. 844, 846 (1972), the Court noted that while 19 out of 26 minorities passed the exam, 202 of 318 whites passed. In later proceedings the Court neglected this statistic and found that a prima facie case was established on the basis of a comparison between

* Employment Practices Decisions

population figures and employee figures. 345 F. Supp. 844, 846 (1972).

This Court does not find the available exam statistics sufficient in themselves to establish a prima facie showing that the exam is discriminatory. A comparison of population and employment statistics, however, is much more telling. Boston has a black population of approximately 16%. The combined minority population may exceed 23%. [See *Associated General Contractors, supra.*] The city has a fire force of approximately 1,983 men. Of that total there are 16 blacks and 2 Spanish-surnamed persons who represent approximately 0.9% of the total force. The City of Springfield has a black population of approximately 13%. Of 475 firefighters in that city, one is black and none are Spanish-surnamed. The one black represents 0.2% of the total force. The City of Cambridge has a black population of 6.1%, and a fire fighting force of 305 men, four of whom are black; one is Spanish-surnamed. They represent approximately 2% of the total force. New Bedford has a black population of approximately 3.5%. Minorities represent approximately 1% of the fire force. Worcester has a black population of approximately 2%. Minorities represent 1% of the fire force there.

These statistics, especially for the Cities of Boston and Springfield, are most significant. The Court uses them in support of the meager exam statistics and finds that plaintiffs have established a prima facie case that the Fire Fighter Entrance Examination (FFEE) has a discriminatory effect on blacks and Spanish-surnamed persons. As noted in *Vulcan Society* v. *Civil Service Commission*, CCA Second Circuit, Nos. 73-2287 & 2317 (Nov. 21, 1973), such a finding is not determinative of the issue but merely shifts the burden to the defendant to justify the use of the exam. This is a burden a public employer should not be unwilling to assume.

Validation

The burden has shifted to the defendants to prove a "manifest relationship" between the exam and the job. [*Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).] In *Castro* v. *Beecher, supra,* at 459 F.2d 732, the Court of Appeals stated that where the suspect classification (here the FFEE) is shown to have a racially discriminatory impact, the employer must show that the exam is in fact "substantially related" to job performance by coming forward with "convincing facts" establishing a fit between the qualifications and the job. Defendants' expert Costa testified that the employer cannot operate from some expert point of view that the tests are doing what they are supposed to do. It was his opinion that the courts and professional psychological standards always require that empirical evidence be obtained. [Tr. 3-22.] The Court agrees.

Where it has been determined that an exam is suspect, the courts have required that a "fit" between the exam and job performance must be established by a study conducted according to professionally accepted standards. The Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, *et seq.*, suggest minimum standards for test validity and establish guides to be used in determining the validity of employment tests. "Courts confronted with challenges to public employment examinations predicated upon the equal protection clause of the Fourteenth Amendment have generally agreed that the Guidelines issued by the EEOC provide persuasive standards for evaluating claims of job-relatedness." [*Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1273, n. 23. (S.D.N.Y., 1973). See also *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351 (N.D. Cal., 1972), and cases cited in n. 3 of 1354.] And as was noted in *Officers*

for Justice v. *San Francisco,* Memorandum and Order, No. C-73-657 (Northern District of California, Nov. 23, 1973), at p. 15, these Guidelines may indeed have the force of law in cases brought under Title VII of the Civil Rights Act of 1964. See *Griggs, supra,* at 433, where the Court stated:

> "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting §703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."

The Civil Service defendants apparently anticipated their burden and during the pendency of these matters caused a validity study to be undertaken by Dr. Costa, who has been retained as the principal psychological testing consultant to the MDCS and was qualified by the Court to testify as an expert witness on employment testing practices. Some brief remarks about validity study procedures in general may be beneficial at this point.

There are two types of test validation studies recognized by the EEOC Guidelines. The Court will borrow from Judge Weinfeld's clear and concise descriptions of these studies in *Vulcan Society, supra,* 360 F. Supp. 1265, 1273 (1973).

> "The preferred method of test validation is criterion-related or empirical validity, which includes what are referred to as the predictive and concurrent methods of validation. Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test

> scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job."

Predictive validation is preferred where feasible over concurrent validation. A method less preferable than criterion-related validity is known as "content validity." Again borrowing from Judge Weinfeld in *Vulcan, supra*, at p. 1274:

> "Content validation is less preferable than the criterion-related methods of test validation but nevertheless a professionally accepted means of establishing job-relatedness where the more desirable empirical methods are impractical. [See EEOC Guidelines, 29 C.F.R. §1607.5(a).] An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job."

For either type of study, it is important that a careful job analysis be undertaken. The criteria used for an empirical validation study should be important criteria selected on the basis of a thorough job analysis. Likewise, a thorough knowledge of the job to be tested is necessary when constructing a content valid examination. "A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill. It is conducted by interviewing workers, supervisors and

administrators; consulting training manuals; and closely observing the actual performance of the job." *Vulcan, supra,* at 1274.

Dr. Costa conducted what he described as a concurrent criteria-related validity study. A brief discussion of terms as described to the Court is in order. The mathematical relationship between the test scores and the measures of job performance is referred to as the correlation coefficient. A correlation coefficient of .00 means the study shows no relationship between the test and job performance, while a coefficient of 1.00 indicates a perfect relationship between the two. In order for a correlation coefficient to have significance, it must be both statistically and practically significant. Statistical significance means that the possibility of the results being reached by chance are minimal. Practical significance means that the coefficient shows a sufficiently high relationship between success on the test and successful job performance. Both Dr. Costa and plaintiffs' expert, Dr. Hunt, agreed that as a "rule of thumb" a coefficient of .3 would be the minimum level to indicate a satisfactory relationship. A lower coefficient would not be practically significant and would not justify use of the test.

Dr. Costa used two groups of subjects in his study. Group I consisted of 88 white Boston firefighters who had been recently appointed to the force from the list established in April 1972 as a result of the August 1971 FFEE. Group II consisted of 134 men who had been firefighters for approximately two years. The study implemented two "Performance Appraisal Systems." System I tested for job relatedness between the MDCS job predictors: i.e. exam score, training and experience, and the final score (general average mark), and the performance of 13 tasks considered by both experts to be important criteria of the job. The criteria consisted of such tasks as ladder extension, handling a pre-connected hose (both

team-type performances consisting of nine sub-tasks with each man being tested at each sub-task), and such individual performances as air mask operation, extinguisher selection, securing lines and knots, and hose and hydrant operation. Only Group I was tested in Appraisal System I. The study was not done under actual firefighting conditions, but was conducted at the Boston Fire Department's training camp on Moon Island. Appraisal System II consisted of ratings of job performance obtained from company captains and lieutenants collected under actual firefighting conditions. The men were rated on twelve separate scales including understanding buildings, constructions, and fire behavior; mechanical ability; holding up under pressure and stress; carrying out orders; and overall job effectiveness. Both Groups I and II were rated in System II.

System II did not reveal any significant correlations between the two test criteria used (written exam score and general average mark) and successful job performance in either group tested. Dr. Costa admitted that if the results of System II were all that he had available upon which to base a conclusion, he would conclude that the exam was not a valid predict of successful job performance. (Tr. 4-22, 23.)

Dr. Costa concluded that System I revealed seven significant correlations. In three of these, however, the predictor was the general average mark score. Since this score is a composite of the written exam score and the training and experience score, its utility in establishing the validity of the exam itself seems questionable. In addition, two of the significant correlations are based on a comparison of the number of errors made on the four best predicted criteria and the written test score. Frankly, the Court has had difficulty understanding the significance of these correlations. Plaintiff argues it is merely a re-

statement of the original thirteen criteria, only two of which have been shown to have a significant correlation with the written exam. This may be so. At any rate, the Court does observe that the Air Mask Operation (.346) and the Loop Man Position (.313) are the only two job tasks which show a significant relationship with the written exam score, and Dr. Hunt described these correlations as being barely significant. (Tr. 4-141.)

Experts have interpreted the EEOC Guidelines to require that at least one relevant criterion be both statistically and practically significant. 29 C.F.R. § 1607.5(c)(1). Dr. Hunt testified that if one significant correlation is to be accepted as evidence that an exam is job related, the one relevant criterion must represent an adequate measure of total job performance factors. If the one criterion only represents a small percentage of the important factors of the job, this should not be considered adequate to support a conclusion of test validity. Although she agreed that the 13 criteria implemented were important, it was Dr. Hunt's opinion that there were only two significant correlations and that those two did not represent an adequate measure of the total factors involved in the job. Based on Dr. Costa's study, she testified that she would not conclude the exam was job related. Dr. Costa is of the opinion that the exam has been shown to be valid according to EEOC Guideline minimum requirements and he has concluded that the exam is a valid predictor of job performance.

The Court has had no little difficulty in examining the testimony of both experts and in interpreting Dr. Costa's study and the results derived therefrom. Nor has the Court relished the thought of determining which expert opinion to accept on a subject about which the Court knows very little. It is easy for a member of the legal profession, however, to understand how two competent professionals

can come to different conclusions given the same set of facts. And it appears, as with the law, that the area of psychological testing is not one where elements of preciseness and exactness usually obtain. The EEOC Guidelines, 29 C.F.R. § 1607.5(c)(1), caution that a test should be closely scrutinized when it is valid against only one component of job performance. The Court feels close scrutiny should also be given where the test may be shown to be valid against a few components of job performance where those components represent only a small percentage of the total job. Close scrutiny seems particularly appropriate where the exam was not designed by experts. The evidence indicated that the FFEE was designed by persons with no training in psychological measurement or testing.

The Court has concluded that defendants have not met their burden of demonstrating that the exam is "in fact substantially related to job performance." See *Castro, supra*, 459 F.2d at 732. Arguably, the test has been validated according to the EEOC Guidelines' minimum standard. However, the Court cannot conclude that the study provides the "*convincing* facts establishing a fit between the qualification and the job," which *Castro, supra*, requires. The fact that only two, or perhaps four, significant correlations were found between the exam and components of job performance — components which represent only a fraction of those duties a firefighter encounters — and the fact that those correlations were only minimally significant does not constitute "convincing" evidence of job relatedness. There was also some criticism of the way in which the study was conducted, but the Court does not feel such criticism warrants discussion in light of this determination.

The Court does not wish to imply that it is establishing standards apart from those embodied in the EEOC

Guidelines. However, these Guidelines must be read in the context of certain precedent binding upon this Court (*Griggs, supra; Castro, supra*) which clearly implies that facial compliance with the minimum standards may not be sufficient to meet the "heavy burden" which falls upon a public employer when required to prove the validity of a selection examination which has an adverse racial impact.

Recruitment

The parties did not agree to treat the hearing as a trial on the merits as to the recruitment issue. As noted previously, since 1968, M.G.L. c. 31 § 2A has required the Director of Civil Service to establish a recruitment program to fill vacancies in the classified civil service, including positions as firefighter. Apparently, the extent to which the program is operated is dependent upon the amount of funds received through appropriations of the Massachusetts legislature. Prior to 1968, it appears that the only statutory duty was to send posters to the city and town halls throughout the Commonwealth, advising the public of available positions and any up-coming exam.

Although there does not appear to be any statutory duty to recruit on the part of the Boston Fire Department, Commissioner Kelley testified at the taking of his deposition that, as Commissioner, he has direct responsibility for recruiting for the Department. However, he has delegated that job to the officer in charge of the Community Relations Division of the Department and despite the Commissioner's ultimate responsibility, he expressed very little knowledge of what actual efforts have been made in the area of recruiting.

Based on a comparison of the population statistics and minority employment statistics referred to earlier, plaintiffs have made a threshold showing of discrimination in the recruitment policies of the MDCS and of the Boston

Fire Department. Defendants have presented some evidence attempting to rebut that inference.

In November of 1971, Barton Graham was employed as Assistant Supervisor of Recruitment for the Division of Civil Service. He testified that the present emphasis of the recruiting effort is in the area of minority recruiting for the fire service and corrections service. The Division has a mailing list of over 200 minority related organizations which receive any notices of up-coming exams. He and his subordinates have visited organizations and schools, and a year ago in anticipation of an up-coming exam there was advertising over the electronic media. Newspaper advertising has been done. In the City of Springfield, Mr. Graham has worked closely with the Springfield Urban League which has contracted with the Division to recruit minorities in that part of the state. Apparently these efforts have been quite successful judging from some 200-plus applications received from minorities from the Springfield area. The Division has made plans to increase these efforts, including continued advertising over the local electronic media and the use of billboards. There has also apparently been much effort to advertise in the Spanish language and one of Mr. Graham's subordinates has concentrated on recruiting Spanish-surnamed persons. Prior to these recent efforts, it appears the Civil Service did little more than what was required of them by state low, that is sending posters to city and town clerks.

In light of the lack of any pre-1968 statutory duty to recruit, the lack of any evidence indicating the Division of Civil Service ever did, in fact, engage in any policy of positive recruitment until recently, and the evidence presented by Civil Service defendants as to current recruitment activities, the Court feels the defendants have come very close to rebutting any inference they discriminated

in their recruitment policies. In fact, they had no policy in the past other than the statutory requirement. Even if there had been an implied duty or a necessity to recruit and interest persons in joining the fire force, such an obligation would most logically have fallen upon the city or town in need of firemen and not the Civil Service.

The Court finds that it is not probable plaintiffs will succeed on the merits as to the issue of alleged discriminatory recruitment policies on the part of the Civil Service defendants, and preliminary relief is therefore denied. Practically speaking, this determination has little effect as the Court will require, as part of its order, an affirmative recruitment policy to help remedy the present effects of past discrimination on the part of the Civil Service — that discrimination being, the requirement that applicants pass a non-job related examination which has an adverse racial impact on blacks and Spanish-surnamed persons.

The City of Boston also presented evidence attempting to rebut the inference that they have engaged in discriminatory recruitment policies. In 1968, two black Boston firefighters spent one day in Boston's predominantly black negihborhood passing out literature and trying to promote interest in the fire department. One of the men, Robert Powell, testified they approached from 80 to 100 people who indicated interest. The people were told of a training program which would be held to help prepare minority applicants for the FFEE. Such a program was held. It was open to all applicants and few blacks actually attended. There was no evidence indicating what, if any, type of recruiting was done between 1968 and 1972, although the training courses did continue in those years. In 1972, the fire department accelerated somewhat its minority recruitment program. Two black firefighters testified that for a period of weeks they talked to organizations, at high schools and to people on the street

trying to promote interest among blacks in the fire department. Each of them had also at different times been sent out of state, at the department's expense, to conferences of black firefighters where recruitment efforts and techniques were apparently discussed. A Spanish-surnamed firefighter testified that he spent approximately two weeks in 1972 doing full-time recruitment work in the predominantly Spanish-speaking neighborhood of Boston. He passed out leaflets and arranged for announcements to be made over a Spanish radio program. About 100 people indicated an interest but he recalls only approximately 30 showed up for the first training class and that number rapidly dwindled.

All witnesses who were asked agreed that the greatest source of new applicants for the fire department is word of mouth and encouragement from friends and relatives already on the force. This was recognized as being true in the police department by Judge Wyzanski in his order approving the consent decree in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass., 1973), at 659. This Court is of the opinion that the fire department is the entity more closely concerned with getting people to fill vacant positions on the force. If indeed, for so many years those positions have been filled as the result of white firemen encouraging white friends and relatives to join the force, it is no little wonder that blacks and Spanish-surnamed persons represent such an insignificant percentage of the force. It is of course most understandable how this has happened and the Court wishes to make it clear that it is not suggesting such an exclusionary policy has been followed intentionally or by design. Such a finding is not essential for the granting of injunctive relief. [See *Griggs, supra.*] Where, however, the policy has in effect resulted in the exclusion of minorities from the fire department, the policy must be changed and present effects of past discrimination must be remedied.

From these facts the Court has determined that plaintiffs will suffer irreparable harm in the nature of a lack of equal opportunity to compete for jobs on the Boston Fire Department, that the granting of preliminary relief will not cause irreparable harm to the defendants, that plaintiffs are likely to succeed on the merits, and that the public has an interest in being served by a fire department which offers equal opportunity for employment to all of its citizens.

Relief

There is a substantial body of case law allowing, and in some instances requiring, affirmative relief to remedy the present effects of past discrimination. "We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1964). See also *Associated General Contractors, supra*, and cases cited therein at 361 F. Supp. 1303-1307. Affirmative relief has been granted, in particular, in a number of cases where discriminatory hiring practices have been found in municipal police and fire department hiring policies. See *Vulcan Society* v. *Civil Service Commission, supra*, CCA Second Circuit, Nos. 73-2287 & 2317 (Nov. 21, 1973); *Bridgeport Guardians, supra; Commonwealth* v. *O'Neill*, 473 F.2d 1029 (3rd Cir., 1973); *Castro* v. *Beecher, supra*, at 459 F.2d 725; *Carter* v. *Gallagher, supra; Officers for Justice, supra; Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187 (D.Md., 1973).

The Court is vested with broad discretionary power in shaping equity decrees. "Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized

by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' [*Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).]" *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1972). In framing its relief this Court has attempted to "eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Lemon, supra*, a 201. Among other things, the Court has considered the importance of preserving morale within the fire departments and avoiding racial discord. It has considered the understandable anxiety of men currently on existing Civil Service eligibility lists and is concerned that they may not be dealt with unfairly. It is concerned with the future of plaintiffs who have been discriminated against, though it be unintentional, and who seek an equal opportunity to compete for positions on the fire departments throughout the Commonwealth. And it is concerned with the public which deserves to have a full complement of qualified firefighters protecting the cities and towns of the Commonwealth.

The Court has studied the proposed decrees submitted by the parties and has studied and adopted some thoughts from the final consent decree entered in *Castro* v. *Beecher*, *supra*. The Court would like to add that the following decree is subject to amendment where the parties so agree and with the approval of the Court.

Decree

This case having come before the Court for a hearing on plaintiffs' motion for preliminary injunction and the parties having agreed pursuant to Federal Rule of Civil Procedure 65(a)(2) that the evidence presented on the testing issues should be considered as the evidence on the trial on the merits, and the Court having heard the testimony of the witnesses and the oral arguments of the

parties for approximately five and one-half trial days, and the Court having considered the oral and documentary evidence presented, the briefs and arguments of counsel, and having made findings of fact and conclusions of law, and being of the opinion that a decree should be entered; it is hereby ORDERED, ADJUDGED and DECREED:

1. The defendants City of Boston and Massachusetts Division of Civil Service and their officials, agents, employees, and all persons in active concert or participation with them are enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any applicant or potential applicant for employment with the Boston Fire Department or any other fire department in the Commonwealth subject to Civil Service law.

2. No further certifications of permanent appointments shall be made to the position of firefighter for the City of Boston or other cities and towns subject to Civil Service law on the basis of the list completed from the August 1971 firefighter examination unless done in compliance with the terms of this decree.

3. The City of Boston and any other city or town subject to Civil Service law may request Civil Service for immediate certification of candidates who are currently on the existing Civil Service eligibility list to fill, on a provisional basis, existing vacancies or vacancies which may arise prior to full compliance with this decree. The Court further orders that the life of said list shall, if necessary, be extended beyond the time of its expiration under Massachusetts law and until a new eligibility list is established in accordance with this decree. Should the existing list prove insufficient to fill the number of vacancies existing, the cities or towns subject to Civil Service law may hire firefighters on a provisional basis. The method of selection shall be left to defendants' discretion.

4. The Massachusetts Division of Civil Service shall cease using written firefighter entrance examinations of the type administered by the Division of Civil Service in August 1971, for the purpose of determining qualifications for the selection of firefighters. Should the Division of Civil Service desire to utilize entrance examinations in the future for the purpose of selecting firefighters, such examinations shall be demonstrably job-related and validated in accordance with the "Guidelines on Employees Selection Procedures" issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.1 et seq., or otherwise shown to have no discriminatory impact. If the parties disagree as to whether a written examination has been shown to be valid within the meaning of the Guidelines, the question of their validity and job-relatedness shall be resolved by the Court, and such resolution, whether by the parties' agreement or by the Court, shall be accomplished before any such test is put into use for the purpose of qualifying or selecting. As with the instant study, the Court will scrutinize closely a future study which shows only a minimal level of job-relatedness.

5. Defendant City of Boston is preliminarily enjoined from requesting certifications of appointments for permanent positions on the fire department unless the following conditions have been complied with. Whenever openings occur in any positions covered by this Decree warranting the giving of an examination, the defendant City of Boston shall contact organizations in the black and Spanish-surnamed communities and high schools and junior colleges with substantial black and Spanish-surnamed enrollments and shall provide them with information regarding such openings, including qualifications and selection procedures, the rates of pay and hours of work and the time, place and method of applying for such vacancies.

6. At least 45 days prior to any examination for firefighter, the defendants City of Boston and Division of Civil Service shall engage in such personal recruiting efforts and such public service and other announcements on radio and television stations and in other media directed at the black and Spanish-surnamed communities as are reasonably necessary in order to provide enough qualified black and Spanish-surnamed American applicants to achieve the goals set forth in this decree.

7. Subsequent to obtaining the results of a valid examination, the defendant Director of the Massachusetts Division of Civil Service, the defendants Massachusetts Civil Service Commissioners and their successors in office, shall promptly commence certifying firefighter applicants as eligible for appointment for each fire department subject to Civil Service. For each fire department a pool of eligible firefighter candidates shall be established and candidates certified in the following manner:

(a) Group A shall consist of all black and Spanish-surnamed applicants who failed any previous Fire Fighter Entrance Examination but passed the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said candidates shall be ranked in accordance with existing Massachusetts law.

(b) Group B shall consist of all persons on the current eligibility list established on April 4, 1972. Said candidates shall be ranked in accordance with existing Massachusetts law except that any such persons who have been appointed to a fire department from said list on a provisional basis shall be listed first.

(c) Group C shall consist of all black and Spanish-surnamed persons, excluding those in Group A who shall pass the new valid examination and are otherwise qualified for appointment on the basis

of existing requirements. Said candidates shall be ranked in accordance with existing Massachusetts law.

(d) Group D shall consist of all other persons, excluding those in Groups A, B and C, who pass the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said persons shall be ranked in accordance with existing Massachusetts law.

8. In response to requisitions submitted by fire departments, candidates shall be certified to such departments on the basis of one candidate from Group A for every candidate certified from Group B until the list of candidates from Group A is exhausted.

9. Upon the exhaustion of Group A, candidates shall be certified to requisitioning fire departments on the following basis:

(a) For the Cities of Boston and Springfield, one candidate from Group C for each candidate certified from Group B.

(b) For all other cities and towns, one candidate from Group C for every 3 candidates certified from Group B, until the candidates from Groups B and C are exhausted.

10. Should a candidate qualify to be placed in Groups A, B or C, after exhaustion of the Group for which he is eligible, said Group will be revived for purposes of affording the candidate the position he would have enjoyed.

11. Upon the exhaustion of Groups A, B and C, candidates shall be certified from Group D. Group D shall expire in accordance with Massachusetts law.

12. The above hiring procedure shall apply to all future eligibility lists established subsequent to a valid firefighter entrance examination, and shall apply to all cities and towns subject to Civil Service law which have a minority population of 1% or more. As a city or town achieves

a complement of minorities commensurate with the percentage of minorities within the community, certifications will be made according to existing Massachusetts law.

13. At this time, the Court will make no specific order as to record-keeping or reporting on the part of the defendants. The Court will give the parties 30 days in which to attempt to reach a satisfactory agreement on those issues. The Court would expect the parties to bear in mind such considerations as the administrative burden to the defendants and the necessity of monitoring the implementation of this decree. If, at the expiration of the 30 days, the parties cannot agree on a satisfactory system, the Court will take appropriate action.

14. Plaintiffs' requests for damages and attorneys' fees are denied.

15. The Court shall retain jurisdiction for such further action as may be necessary or appropriate.

Addendum

It has come to the Court's attention that the defendant Civil Service has scheduled an examination for February 23, 1974. The Court regrets the effect this decision will have on efforts that have been made to inform candidates and prepare them for that examination. However, the defendants knew well during the pendency of this action that a determination adverse to them would most likely result in the Court's refusal to allow such an exam to go forward. The Court is also aware that defendants are making efforts to improve the exam and continue meaningful recruitment policies. Hopefully, such efforts will continue and, in the future, result in a satisfactorily validated exam with a significant number of black and Spanish-surnamed applicants competing.

(s) Frank H. Freedman
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-3060-F
BOSTON CHAPTER, NAACP, INC., ET AL.
v.
NANCY B. BEECHER ET AL.

Civil Action No. 73-269-F
UNITED STATES OF AMERICA
v.
CITY OF BOSTON ET AL.

ORDER
February 11, 1974

FREEDMAN, D.J.

The Decree entered by this Court on February 8, 1974, in the above-entitled cause, is hereby amended to include the following paragraphs:

After paragraph 9(b), add:

(c) If Group B is exhausted prior to Group C, candidates will be certified from Group D in accordance with the ratio established for Group B in paragraphs 8 and 9.

Insert after first sentence in paragraph 12:

Any new list established after the exhaustion of the list described herein shall include a Group of all eligible blacks and Spanish-surnamed persons (as in Group C) and a Group of all other eligible persons (as in Group D). Candidates shall be certified from each Group in accordance with the ratio established in paragraph 9.

(s) FRANK H. FREEDMAN
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-3060-F
BOSTON CHAPTER, NAACP, INC., ET AL.
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Civil Action No. 73-269-F
UNITED STATES OF AMERICA
v.
CITY OF BOSTON ET AL.

ORDER
March 6, 1974

FREEDMAN, D.J.

On reconsideration, the Court feels that it acted prematurely in denying plaintiffs' request for damages and attorneys' fees as those issues have not ben fully argued before the Court. Accordingly, Paragraph 14 of the Decree of February 8, 1974 shall be stricken from the decree and the issues to which it speaks considered at a later time.

(s) FRANK H. FREEDMAN
District Judge

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 1 1975
MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONERS,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., AND THE UNITED STATES OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS,

PETITIONERS,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., AND THE UNITED STATES OF AMERICA,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinions of the Court of Appeals, dated September 18, 1974 and November 8, 1974, are reported at 504 F.2d 1017 (1st Cir. 1974) Pet. App. A. p. 21; App. B. p. 42. The opinion of the District Court, dated February 8,

1974, and a supplemental order, dated February 11, 1974, are reported at 371 F. Supp. 507 (D. Mass. 1974) Pet. App. C. p. 46; App. D. p. 75. The supplemental order entered by the District Court on March 6, 1974 is not reported, and appears in the Petition at Appendix E, page 76.

Jurisdiction

The judgments of the Court of Appeals were entered on September 18, 1974 and November 8, 1974. The Petition for Writ of Certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the courts below properly found that the firefighter entrance examination administered on a statewide basis had adverse impact on minorities, was not shown to be significantly related to successful job performance, and was therefore unlawful.

2. Whether the District Court, as affirmed by the Court of Appeals, abused its discretion in ordering that qualified minorities be certified for hiring on an accelerated basis to overcome the present effects of past discrimination.

3. Whether the Court of Appeals, in light of the Eleventh Amendment, properly taxed the costs of appeal against a state official.

Constitutional Provisions

The constitutional provisions involved in this case are the Fifth, Eleventh and Fourteenth Amendments to the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution, in pertinent part, appear at page 3 of the Petition.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes and Rules

42 U.S.C. § 1981, provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000 e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The *Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 et seq., in pertinent part, appear at page 4 of the Petition.

Rule 39 (a) of the Federal Rules of Appellate Procedure provides in pertinent part:

> . . . if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered . . . .

Statement of the Case

This is a class action, filed on October 4, 1972 by the Boston Chapter, N.A.A.C.P., Inc. and by twelve Black and one Spanish-surnamed persons on behalf of Black and Spanish-surnamed persons who seek a firefighter position in any of the fire departments under the jurisdiction of Massachusetts civil service law. The Attorney General of the United States filed a similar action on January 24, 1973, and the two actions were consolidated on July 18, 1973.

Plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1981, 1983, to redress discriminatory recruitment and hiring practices by the members of the Massachusetts Civil Service Commission, the Director of

Civil Service, and the Commissioner of the Fire Department of the City of Boston. Plaintiffs alleged that the defendants have engaged in a policy and practice of discriminating against the plaintiffs on account of their race, color and/or national origin, in that the defendants' standards and procedures in the recruiting and hiring of firefighters unlawfully favor non-Spanish-surnamed white persons and tend to exclude, limit, and otherwise discourage plaintiffs' employment in fire departments subject to Massachusetts civil service law. Specifically, plaintiffs alleged that Black and Spanish-surnamed persons have been denied rights secured to them by the Fourteenth Amendment to the United States Constitution by the defendants' recruitment practices, and by the civil service firefighter entrance examination (FFEE hereinafter).

The district court held a seven-day evidentiary hearing in July and September, 1973. The hearing commenced as a hearing on motions for a preliminary injunction but, with respect to the FFEE issue, was subsequently consolidated with the trial on the merits. On February 8, 1974 the district court entered an opinion and order. Pet. App. C. p. 46.[1]

The district court found that the FFEE administered in 1971 by the defendant Massachusetts Division of Civil Service only excluded 44% of the Caucasian candidates but excluded 61% of the Black and Spanish-surnamed applicants. Experts called by both sides testified that Black and Spanish-surnamed persons typically perform less well on tests like the FFEE. The district court also found that the FFEE was not professionally developed. Finally, the district court found that there was a substan-

[1] The hearing was limited to the testing and recruitment issues. The court deferred to a later date consideration of the remaining issues in the case, relating to the use of arrest and conviction records, a mandatory swim test, and a high school diploma requirement.

tial disparity between the racial composition of the five major cities of Massachusetts and the racial composition of the fire departments serving those cities. For example, the district court found that the combined minority population of the City of Boston may exceed 23% but less than one percent (18) of the 1,983 firefighters are Black or Spanish-surnamed. Pet. App. C. pp. 48-56, 63. The record showed that since 1960 the Boston Fire Department has appointed 805 firefighters, of whom six are Black and two are Spanish-surnamed. Pet. App. A. p. 39, n. 17. The district court ruled that the plaintiffs had established a *prima facie* case of racial discrimination and that the defendants had the burden of justifying the use of the test. Pet. App. C. p. 56.

In anticipation of this burden the petitioners had engaged an expert to conduct a validation study to determine whether the FFEE was predictive of successful job performance. This expert testified that he found positive correlations between test scores and the successful completion by firefighters of two job tasks; namely, putting on a gas mask and removing a hose from the back of a truck. Based on his study this expert concluded that FFEE was job-related. Pet. App. C. pp. 57-63. The district court found that the correlations found in the validation study "were only minimally significant" and that they "represent only a fraction of those duties a firefighter encounters". The district court concluded that the study "does not constitute 'convincing' evidence of job relatedness". Pet. App. C. p. 63.

The district court also found that the recruitment practices of the Boston Fire Department unlawfully excluded Black and Spanish-surnamed applicants. Pet. App. C. p. 67.

On February 8, 1974 the district court entered its Opinion and Decree, holding that the FFEE discriminates

against Black and Spanish-surnamed persons. The district court enjoined the Civil Service defendants from administering entrance examinations which have not been validated in accordance with the *Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 et seq. (*EEOC Guidelines* hereinafter).

The district court ordered the Civil Service defendants to authorize provisional appointments from the current eligibility list, and to rank first on the next eligibilty list for permanent appointments those persons who receive provisional appointments. All persons on the next eligibility list will be certified for permanent appointment on a one-for-one basis with any Black or Spanish-surnamed person who failed a previous FFEE and who passes a valid FFEE;[2] on a one-for-one basis with any other Black or Spanish-surnamed person who passes a valid FFEE and seeks appointment to the Boston or Springfield Fire Department; and on a three-for-one basis with any other Black or Spanish-surnamed person who passes a valid FFEE and seeks appointment to a fire department serving a community whose minority population is more than one percent, until such time as the fire department achieves a complement of minorities commensurate with the percentage of minorities living within the community. Pet. App. C. pp. 69-74.

The district court ordered the Civil Service defendants to affirmatively recruit Black and Spanish-surnamed persons for future firefighter entrance examinations. It issued a preliminary injunction against the defendant Fire Commissioner for recruitment practices that discriminated

[2] The Decree does not affect the right of an appointing authority to decline to hire a candidate on the eligibility list or to terminate a firefighter during the six-month probationary period. In addition, all applicants must also satisfy certain other entrance requirements, including a rigorous physical fitness test and medical examination.

against Black and Spanish-surnamed persons, and ordered him to affirmatively recruit Black and Spanish-surnamed persons. Pet. App. C. pp. 71-72. The defendant Fire Commissioner did not appeal from the Opinion and Decree of the district court. However, the Civil Service defendants did appeal.

On September 18, 1974 the court of appeals affirmed the Opinion and Decree of the district court. On November 8, 1974 the court of appeals awarded the N.A.A.C.P. plaintiffs their costs of appeal, in the amount of forty-nine dollars and fifty cents ($49.50).

On December 16, 1974 the Attorney General for the Commonwealth of Massachusetts, purportedly on behalf of the petitioners, filed in this Court a Petition for a Writ of Certiorari.[3]

Reasons For Denying the Writ

I. The Decision of the Court of Appeals Comports With the Decisions of this Court and the Decisions of the Other Circuit Courts.

A. *The Courts Below Properly Found That the Respondents Established a Prima Facie Case of Racial Discrimination.*

In finding a *prima facie* case of discrimination the courts below based their conclusion on three factors:

First, the 1971 FFEE was found to have had an adverse impact on Black and Spanish-surnamed applicants.

[3] On December 5, 1974 the Massachusetts Attorney General informed the Massachusetts Supreme Judicial Court, in oral argument in an unrelated case, that the Director of Civil Service and the majority of the members of the Massachusetts Civil Service Commission had voted to oppose a request for review by this Court of the Opinion of the court of appeals, but that he intended to seek review despite the wishes of his clients.

Only 13 of the 33 applicants, or 39%, who identified themselves as Black or Spanish-surnamed passed the examination. On the other hand, 1737 of the 3089 Caucasians, or 56%, passed the examination. Pet. App. A. p. 24, n. 3. Although these statistics showed a disparity, the courts below did not rely solely on these statistics because of the small size of the minority pool of candidates, *Ibid.*

Second, the record reflected a tremendous disparity between the racial composition of certain fire departments and the communities served by said fire departments. For example, although the combined minority population of Boston is probably close to 23%, less than one percent of Boston's firefighters is Black or Spanish-surnamed. The evidence with respect to four other cities with substantial Black and Spanish-surnamed populations also showed disparities. Pet. App. A. p. 24; App. C. p. 56.

Third, the testimony from experts called by *both sides* established that Black and Spanish-surnamed candidates typically perform more poorly than Caucasians on the type of tests administered to firefighter candidates. Pet. App. A. pp. 26-27.

Based on the above findings, which were not controverted, the courts below properly held that the respondents established a *prima facie* case of racial discrimination and, therefore, determined that the petitioners had the burden of justification, and had to "prove that the disproportionate impact was simply the result of a proper test demonstrating lesser ability of black and hispanic candidates to perform the job satisfactorily". *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 392 (2d Cir. 1973). This ruling is consistent with decisions of this Court and of the Circuit Courts of Appeals which have had occasion to consider the issue.

This Court has ruled that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited". *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). With respect to employment tests, this Court in *Griggs* required "that any tests used must measure the person for the job and not the person in the abstract". *Id.* at 436. Thus, when a job requirement is found to have a significant adverse impact on minority group applicants, this Court has placed on the employer the burden of showing that any given requirement "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used". *Id.* at 431.

In addition, this Court has recognized that in many cases it is proper to infer discriminatory impact from racial statistics, *Mayor of the City of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). And in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court noted that "[t]he District Court may, for example, determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices' ", at p. 805, n. 19. *In accord: United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 551 (9th Cir. 1971), *Cert. denied*, 404 U.S. 984 (1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371, 373, n. 4 (3rd Cir. 1974); *U. S.* v. *Chesapeake and Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir., 1970), *Cert. denied*, 401 U.S. 954 (1971); *Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9, 18, n. 15 (1st Cir. 1973), *Cert. denied*, 416 U.S. 957 (1974).

B. *The Petitioners Failed to Demonstrate that the Firefighter Entrance Examination Was Predictive of Successful Job Performance and, Therefore, Failed to Satisfy Their Burden of Proof.*

In an effort to satisfy their burden of justifying the use of the FFEE, the petitioners offered the testimony of an expert witness who testified that he conducted a "concurrent validation" study and that his findings demonstrated that the FFEE was predictive of successful job performance as required by the *EEOC Guidelines*. After carefully examining the evidence, both courts concluded that the petitioners had not demonstrated that the test was "in fact substantially related to job performance". Pet. App. C. p. 63; App. A. pp. 33-37. The petitioners now seek, in effect, to persuade this Court that these findings were erroneous. However, it is well settled that where both courts below are in agreement as to the facts, those findings should be considered binding by this Court. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

In an effort to distinguish this case from the *Comstock* case, the petitioners attempt to frame the issue as an issue of law rather than an issue of fact. Accordingly, the petitioners contend that the courts below imposed a more rigorous standard of test validation than is required by the *EEOC Guidelines*. A review of the decisions below, however, clearly demonstrates that the courts below did not impose a more rigorous standard but simply found that the petitioners' validation study did not satisfy the minimum requirements of the *EEOC Guidelines*. The district court specifically stated that "[t]he Court does not wish to imply that it is establishing standards apart from those embodied in the EEOC Guidelines". Pet. App. C. pp. 63-64. Likewise, the Court of Appeals stated that:

> We do not think the district court was bound to find either compliance with the Guidelines or "job relatedness" in a more general sense. The Guidelines are not satisfied by just any correlation to any facet of job performance. They require close scrutiny of "the use of a single test as a sole selection device . . . when the test is valid against only one component of job performance". § 1607.5(c). The test here, and the validation study performed by defendants' expert, do not survive close scrutiny.

Pet. App. A. p. 34; See also Pet. App. A. pp. 34-37 for a detailed criticism of the validation study.

C. *The Remedial Order Entered by the District Court and Approved by the Court of Appeals Is a Constitutionally Permissible Method of Eliminating the Present Effects of Past Racial Discrimination.*

The district court found that the class of individuals represented by the N.A.A.C.P. respondents was the victim of unlawful testing and recruitment practices. In fashioning an appropriate remedy, the district court required the petitioners to authorize provisional appointments from the current eligibility list, and to rank first on the next eligibility list for permanent appointments those persons who receive provisional appointments. All persons on the next eligibility list will be certified for permanent appointment on a one-for-one basis with any Black and Spanish-surnamed person who failed a previous FFEE and who passes a valid FFEE, on a one-for-one basis with any other Black and Spanish-surnamed person who passes a valid FFEE and seeks appointment to the Boston or Springfield Fire Department, and on a three-

for-one basis with any other Black and Spanish-surnamed person who passes a valid FFEE and seeks appointment to a fire department serving a community whose minority population is more than one percent, until such time as the fire department achieves a complement of minorities commensurate with the percentage of minorities living within the community. Pet. App. C. pp. 72-73, 75.[4]

Petitioners contend that the propriety of the above relief should be reviewed by this Court because it conflicts with prior decisions of this Court, the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, and the provisions of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Pet. pp. 15-19.

The petitioners' argument assumes that the class of Black and Spanish-surnamed persons represented by the N.A.A.C.P. respondents was not the victim of unlawful racial discrimination. Their argument ignores the fact that both courts below found discrimination with respect to testing and recruitment, and that this discrimination accounts for the existence of a shocking level of minority underrepresentation in the fire departments subject to Massachusetts civil service law.

This Court has recognized that it is appropriate to consider race in order to remedy prior illegal racial discrimination. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16-17 (1971). The numerical ratios established by the district court have been sustained by the courts of appeals which have had occasion to consider the question. *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir.

[4] On May 7, 1974 the district court determined that 48 of the 107 fire departments subject to Massachusetts civil service law serve areas with a Black and Spanish-surnamed population less than one percent. Nothing in the record suggests the existence of any racially balanced fire department in the Commonwealth of Massachusetts.

1972); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of New York* v. *Civil Service Commission of New York, supra*, (2d Cir.); *Erie Human Relations Commission* v. *Tullio, supra*, (3rd Cir.); *Contractors Association of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *Cert. denied*, 404 U.S. 854 (1971); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. *en banc* 1974), *Cert. denied*, 417 U.S. 965 (1974); *United States* v. *Carpenters, Local 169*, 457 F.2d 210 (7th Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 327 (8th Cir., *en banc*, 1971), *Cert. denied*, 406 U.S. 950 (1972); and *United States* v. *Ironworkers, Local 86, supra*, (9th Cir.).

It is noteworthy that the remedial Decree entered by the district court, which the petitioners attack as unconstitutional, was modeled on the Decree entered with the petitioners' consent in a police discrimination suit after remand from the court of appeals, *Castro* v. *Beecher, supra*, 365 F. Supp. 655, 660-662, (D. Mass. 1973). It is also worthy of mention that counsel for the petitioners recently took a position before this Court which appears to be opposed to the position they now take. See the Commonwealth's Brief in Opposition to Petition for a Writ of Certiorari in *Associated General Contractors of Mass., Inc.* v. *Altshuler, supra*. In that Brief they urged, in support of a 20% minority hiring goal on certain state-funded construction projects, that "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not", at p. 5.

In summary, it is clear that the remedial order entered by the district court was well within its equitable discretion and it is not in conflict with precedent or the Constitution and laws of the United States.

D. *Neither This Court Nor Any of the Circuit Courts of Appeals Have Held That the Eleventh Amendment to the United States Constitution Bars the Taxation of Appellate Costs Against a State.*

Pursuant to Rule 39(a) of the Federal Rules of Appellate Procedure, the Court of Appeals below entered an Order in favor of the N.A.A.C.P. respondents, taxing the petitioners with the costs of appeal, in the sum of forty-nine dollars and fifty cents ($49.50).

Petitioners urge this Court to review that Order on the grounds that it is in conflict with this Court's ruling in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and because it is in conflict with decisions of two other Circuit Courts of Appeals. *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) and *Skehan* v. *Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974).

The forty-nine dollars and fifty cents ($49.50) in appellate costs awarded to the N.A.A.C.P. respondents hardly involves "the payment of a very substantial amount of money" which concerned this Court in *Edelman*, *supra*, at 664. The *Edelman* case dealt not with the question of appellate costs, but with the issue of a retroactive award of state welfare benefits which this Court classified as an award of "accrued liability". In *Edelman* this Court held that such an award was barred by the Eleventh Amendment to the United States Constitution.

It appears well established that the power of an appellate court to tax court costs is to be characterized as an incident to the appeal and not within the scope of the sovereign immunity of a state. In *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1928), this Court held that sovereign immunity did not protect the state of Minnesota against a judgment for costs of litigation before this Court on an appeal from the final judgment of

the highest court of that state. Nothing in the *Edelman* decision suggests that this Court intended to overrule the holding in the *Fairmont Creamery Co.* case. If this Court intended in the *Edelman* case to hold that Rule 39(a) of the Federal Rules of Appellate Procedure is unconstitutional, clearly it would have made this explicit.

Moreover, the two cases cited by the petitioners for the proposition that a conflict exists between the Circuits on the question of taxation of appellate costs against a state are not on point because they are limited to the issue of the taxation of attorneys' fees against the state, an issue that has not yet been ruled on below. Pet. App. E. p. 76. Petitions for a Writ of Certiorari on the question of attorneys' fees have been filed in both *Jordan* (No. 74-403) and *Skehan* (No. 74-558), and should this Court deem it appropriate to consider the question, the N.A.A.C.P. respondents submit that the issue appears to be properly raised in *Jordan* and *Skehan* but not in this case.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS, PETITIONERS

v.

BOSTSON CHAPTER, N.A.A.C.P., INC., AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 21–41 and 42–45) are reported at 504 F. 2d 1017. The opinion of the district court (Pet. App. 46–74) is reported at 371 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1974. The petition for a writ of certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the written examination used by petitioners as a selection device for the employment of firefighters had a disproportionate adverse impact on black and Spanish-surnamed persons, was not shown by petitioners to be job-related, and was therefore unlawful.

2. Whether a court, having found unlawful discrimination in employment on the basis of race and national origin, may properly order that qualified members of the affected classes be hired on an accelerated basis to overcome the present effects of that past discrimination.

3. Whether the Eleventh Amendment prohibits the taxing of costs of appeal against a state official.

STATEMENT

1. On January 24, 1973, the Attorney General brought an action on behalf of the United States under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, alleging that the City of Boston, the Commissioner of the Boston Fire Department, and the Massachusetts Division of Civil Service and its five Commissioners and Director engaged in a pattern or practice of discrimination against black and Spanish-surnamed persons with respect to their employment as firefighters in the Boston Fire Department. The complaint alleged that the defendants' recruiting practices, testing procedures, and other entrance requirements for firefighters tended to deprive black and Spanish-surnamed per-

sons of equal employment opportunities. It sought an injunction against the continuation of the alleged discriminatory practices and other relief designed to overcome the present effects of the past discrimination.

The action was consolidated with a previously filed class action brought by the Boston Chapter of NAACP and by black and Spanish-surnamed persons, who made similar allegations of discriminatory practices with respect to the employment of firefighters by all the cities and towns subject to the Massachusetts civil service law.

After a hearing on plaintiffs' motions for a preliminary injunction—which the parties agreed to treat as a final hearing on the merits with respect to the testing issue—the district court found (1) that "plaintiffs have established a prima facie case that the Fire Fighter Entrance Examination (FFEE) has a discriminatory effect on blacks and Spanish-surnamed persons" (Pet. App. 56), (2) that "defendants have not met their burden of demonstrating that the exam is 'in fact substantially related to job performance' " (*id.* at 63), and (3) that the Boston Fire Department's recruitment "policy has in effect resulted in the exclusion of minorities from the fire department" (*id.* at 67). It accordingly enjoined the defendants "from engaging in any act or practice which has the purpose or effect of discriminating against any applicant or potential applicant for employment with the Boston Fire Department or any other fire department in the Commonwealth subject to Civil Service law" (*id.* at 70).

To eliminate the effects of the past discriminatory practices, the court fashioned a comprehensive plan for the accelerated employment of qualified black and Spanish-surnamed persons (*id.* at 72–74), to be applied by the Division of Civil Service in certifying eligible applicants for employment by the fire departments of "all cities and towns subject to Civil Service law which have a minority population of 1% or more" (*id.* at 73). The plan requires the creation of priority employment groups composed of qualified black and Spanish-surnamed applicants, and it directs that applicants from those groups be certified for employment as firefighters on a 50 percent or 25 percent basis (*id.* at 72–73).[1] The plan is to remain in effect until a city or town "achieves a complement of minorities [in the fire department] commensurate with the percentage of minorities within the community" (*id.*

[1] Group A consists of all black and Spanish-surnamed applicants who failed any earlier test but who pass a valid new test and are otherwise qualified. Group B consists of all persons on petitioners' current eligibility list. Group C consists of all black and Spanish-surnamed persons who pass a valid new test and are otherwise qualified for appointment but who did not fail any earlier test. Group D consists of all other persons who pass a valid new test and are otherwise qualified. (Pet. App. 72–73.)

For the cities of Boston and Springfield, candidates are to be certified on an alternating basis from minority lists (Groups A and C) and the other lists (Groups B and D). For all other cities and towns with minority populations of at least one percent, one candidate must be certified from Group A for each candidate from Group B until Group A is exhausted; thereafter, one candidate must be certified from Group C for every three candidates from the other lists (Groups B and D). (*Id.* at 73, 75.)

at 73–74). Thereafter, certifications for employment by the fire department for that town or city may be made in any non-discriminatory manner consistent with Massachusetts law (*id.* at 74).[2]

2. The court of appeals affirmed in all respects (*id.* at 21–41).[3]

(a) The court held that 1970 census figures showing widespread and substantial underemployment of black and Spanish-surnamed persons as firefighters,[4] taken together with a small testing sample showing that black and Spanish-surnamed applicants performed less well on the firefighter's entrance examination than did others,[5] and uncontroverted expert testi-

[2] The district court also preliminarily enjoined the City of Boston from requesting certifications of eligible applicants for permanent employment in the fire department unless it actively recruits black and Spanish-surnamed applicants for job vacancies (Pet. App. 71–72).

[3] The City of Boston and the Commissioner of the Boston Fire Department did not appeal (Pet. App. 23). The petitioners herein were the only appellants.

[4] Boston's black population was 16 percent and its Spanish-surnamed population was three percent; less than one percent of the city's firefighters were blacks and 0.1 percent were Spanish-surnamed. Springfield's population was 12 percent black and 3.4 percent Spanish-surnamed; 0.2 percent of its firefighters were black, and it had no Spanish-surnamed firefighters. Other cities also showed substantial disparities. (Pet. App. 24–25, n. 4.)

[5] Partial statistics from the August 1971 examination showed that 39 percent of the applicants who identified themselves as black or of Spanish origin passed the test while 56 percent of the applicants who identified themselves as "Caucasian" passed the test (Pet. App. 24, n. 3, 55). The court of appeals stated that "[u]ntil recently relatively few minority members applied for fire fighting jobs, resulting in a very small sample from

mony to the effect that "black and Spanish surnamed candidates typically perform more poorly on paper-and-pencil tests of this type" (*id.* at 27), supported the district court's finding that the plaintiffs made out a *prima facie* case that the test had a disproportionate adverse impact on black and Spanish-surnamed candidates. "[I]t can be argued," the court of appeals stated, "that a showing of significant disproportionality in minority employment, coupled with even minimal proof of a higher minority failure rate, is enough to shift to the Division of Civil Service the burden of justification" (*id.* at 26).[6] But the court did not rest its decision on that ground alone. It was the expert testimony that "conclusively tip[ped] the scale in plaintiffs' favor" (*ibid.*). "In light of the expert testimony, we cannot say that the district court was clearly erroneous in its ultimate fact finding that plaintiffs had established a *prima facie* case" (*id.* at 27).

(b) The court of appeals also upheld the district court's finding that the defendants had failed "to show a substantial relationship between the test re-

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which to draw conclusions about their comparative test performance" (*id.* at 25). "[W]here, as here, the minority sample is disproportionately low, it is both dangerous to rely too heavily on the figures and unfair to ignore them entirely" (*id.* at 26, n. 6).

[6] "When widespread minority underemployment is shown to exist in a given occupation, primary selection devices should not be immunized from study by placing an unrealistically high threshold burden upon those with least access to relevant data. This seems especially so where the small size of the sample may be traceable to the test's discouraging effect as well as to unequal recruitment practices" (Pet. App. 26).

sults and job performance" (*id.* at 28). The firefighter's entrance examination has two parts: 25 questions "covering current events, spelling, vocabulary and arithmetic," and 75 questions "taken verbatim from the 'Red Book,' a fire fighter's preliminary manual available from state officials" (*id.* at 29). The court of appeals stated that "[t]he 'passing' score of 70 was selected arbitrarily, without reference to the expected or actual distribution of scores" (*id.* at 30); that "[t]he civil service examiner who wrote the latest versions [of the test] was without professional training in employment or psychological testing, and did not consult with anyone who had such training" (*ibid.*); that "[t]he general questions in the first part of the test have nothing to do with fire fighting, and plaintiffs' expert was of the opinion that they were not useful even as an index of general intelligence" (*id.* at 30–31); and that the second-part questions, though they deal with firefighting concepts, put "a premium on ability to memorize terms that, at the time [when the test is administered], contain only abstract meaning" (*id.* at 31). "[T]here is a difference," the court stated, "between memorizing * * * fire fighting terminology and being a good fire fighter" (*ibid.*).

Petitioners argued, however, that their test validation study adequately demonstrated that it is substantially job-related. The validation study rated firefighters on the basis of both "objective" and "subjective" measures of job performance. The study found that test scores were not significantly correlated with any

of the 12 subjective measures, separately or in combination, or with the overall objective measure. It did show a barely significant correlation between test scores and two of the 13 separate tasks that composed the objective measure.

The court of appeals quoted and approved (*id.* at 33) the district court's finding that these two "minimally significant" correlations did "not constitute 'convincing' evidence of job-relatedness" (*id.* at 63). The court of appeals stated that the Equal Employment Opportunity Commission's *Guidelines on Employee Selection Procedures*, 29 C.F.R. 1607, which establish minimum standards for test validation, "are not satisfied by just any correlation to any facet of job performance" (Pet. App. 34). They provide that "the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance" (29 C.F.R. 1607.5 (c)(1)). The court of appeals stated that "[t]he test here, and the validation study performed by defendants' expert, do not survive close scrutiny" (Pet. App. 34).

The court of appeals identified several defects in the validation study. Since the subjects of the study had all passed the test, "there is no evidence that those failing would be less capable as fire fighters than those passing" (*id.* at 34–35); "a correlation within the range of 70 to 100 can easily be produced by data that would indicate no significance in differences in the 50 to 70 range" (*id.* at 35). In addition, "the sample for the study would seem biased," because "those with

higher scores also had additional experience on the job" (*id.* at 36) and because some persons who passed the test but who might have been poor firefighters "may have been filtered from the sample by the time of the study because of voluntary resignations, release for unsuitability in training or on the job, failure of the physical, etc." (*ibid.*). Finally, "the defendants never attempted to demonstrate that alternatives to the test are unavailable" (*id.* at 35) and made "no effort * * * to include minorities in the sample of the study" (*id.* at 36), both of which are required by the EEOC *Guidelines* (29 C.F.R. 1607.3, 1607.5(b)(5)). "There are, in sum, too many problems with the test for us to approve it here" (Pet. App. 37).

(c) The court of appeals also rejected petitioners' constitutional and statutory challenges to the relief fashioned by the district court. The court of appeals held that "a program of color conscious relief" is a constitutionally permissible "means of ameliorating the continuing effects of past discrimination" (*ibid.*) and that the relief ordered by the district court "goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities" (*id.* at 38–39).

The court also rejected petitioners' contention that Section 703(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–2(j),[7] "withdraws from the

[7] Section 703(j) states that "[n]othing contained in [Title VII of the Act] shall be interpreted to require any employer * * * to grant preferential treatment to any individual * * * because of the race, color, religion, sex, or national origin of such individual * * * on account of an imbalance which may

district court the power to grant color-conscious relief when the discrimination is unintentional" (Pet. App. 40). The court held that "relief undertaken in order to redress past discrimination, whether or not intentional, is permitted" and that "Section 703(j) deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer" (*ibid.*).

(d) The court of appeals subsequently taxed against petitioners, pursuant to Fed. R. App. P. 39(a), the private plaintiffs' costs on appeal, a total of $49.50. In a supplemental opinion, the court held that an award of costs against state officials is not barred by the Eleventh Amendment (Pet. App. 42–45). The "allocation of costs," it stated, "is an incident to the court's jurisdiction and judgment in the main action" (*id.* at 44).

ARGUMENT

The decision of the court of appeals applies settled principles in a manner consistent with the decisions of this Court and the other courts of appeals. Further review is not warranted.

1. Both the district court and the court of appeals found that the firefighter's entrance examination disproportionately screened out black and Spanish-

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exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer * * *, in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

surnamed applicants and that petitioners had failed to demonstrate that the test was a valid predictor of successful job performance. Applying this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, both courts below held the test unlawful under Title VII of the Civil Rights Act of 1964.

a. Petitioners' primary challenge is to the finding of both courts that the entrance examination had a disproportionate adverse impact on black and Spanish-surnamed applicants (Pet. 10–14). But that finding is amply supported by the record, which shows not only a substantial disparity between minority representation in the firefighter work force and minority representation in the pool of available candidates (Pet. App. 24–25, n. 4), but also a higher failure rate by black and Spanish-origin applicants who took the entrance exam in August 1971 (*id.* at 24, n. 3). There was also uncontroverted testimony from expert psychological witnesses on both sides of the case that written tests of the kind used by petitioners tend disproportionately to exclude black and Spanish-surnamed candidates (*id.* at 26–27). "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error" (*Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214). Petitioners have made no such showing in this case.

b. This Court has ruled that the EEOC *Guidelines on Employee Selection Procedures* represent the administrative interpretation of Title VII by the enforcing agency and are accordingly "entitled to great

deference" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434). All the parties in the courts below took the position that those *Guidelines* should be the point of reference for determining whether the validation study submitted by petitioners was adequate to demonstrate the job-relatedness of the firefighter test.

Both the district court and the court of appeals applied the *Guidelines* to the validation study and properly concluded that petitioners did not meet the burden of showing that the examination "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" (*Griggs, supra,* 401 U.S. at 431). The court of appeals found that a minimally significant correlation between test scores and only two of 25 job performance measures did not survive the close scrutiny required by the *Guidelines* (Pet. App. 34) (see 29 C.F.R. 1607.5(c)(1)); that the cutoff score was arbitrarily selected (*id.* at 30) (see 29 C.F.R. 1607.9); that the defendants made no effort to demonstrate that alternatives to the test were available (*id.* at 35) (29 C.F.R. 1607.3); and that no minorities were included in the validity study (*id.* at 36) (see 29 C.F.R. 1607.4(a), 1607.5(b); see also *United States* v. *Georgia Power Co.,* 474 F. 2d 906 (C.A. 5)).

Petitioners' assertion (Pet. 14–15) that the courts below adopted a "stricter" standard than that set forth in the *Guidelines* is not supported by the language or reasoning of the decisions below. On the contrary, both courts repeatedly cited and relied upon the *Guidelines* as a basis for their holding that job-

relatedness had not been shown (see Pet. App. 37, 57–58, 62–63).[8]

2. Once racially discriminatory practices have been found, courts of equity have not only the responsibility to prevent future discrimination, but also the duty to correct, insofar as feasible, the effects of past unlawful practices. *Louisiana* v. *United States*, 380 U.S. 145, 154. Race consciousness in formulating relief is necessary to effectuate both objectives (see, *e.g.*, *Board of Education* v. *Swann*, 402 U.S. 43, 46), and a numerical remedy is an appropriate mechanism for doing so.[9]

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[8] On December 16, 1974, this Court granted the petition for a writ of certiorari in *Albemarle Paper Company* v. *Moody*, No. 74–389. The petitioners in that case contend, among other things, that the court of appeals erred in holding that petitioners' validation study of their pre-employment examination failed to include analyses required by the EEOC *Guidelines*. They argue (Pet. 12–14) that rigid compliance with the *Guidelines* would nullify the congressional recognition (see 42 U.S.C. 2000e–2(h)) of the utility of non-discriminatory examinations. In the instant case, however, petitioners do not challenge the *Guidelines;* they contend, rather, that their validation study was conducted in accordance with the *Guidelines* and that the courts below imposed a stricter standard of test validation than that established by the *Guidelines*. Petitioners here, unlike the petitioners in *Albemarle Paper*, concede that the "EEOC guidelines are entitled to great deference and should be followed by the courts" (Pet. 15). Thus, the question presented in *Albemarle Paper* is not presented here, and the Court need not defer disposition of the present petition pending the decision in that case.

[9] In the district court, the United States sought numerical hiring goals rather than separate certification lists. Instead, the district court patterned relief upon that agreed to by the Massachusetts Commissioners and Director of Civil Service with regard to police departments in a consent decree in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass.). See Pet. App. 37.

Following these principles, the court of appeals approved priority poolings of qualified black and Spanish-surnamed applicants, to be certified for employment on a 50 percent basis for Boston and Springfield and on a 25 percent basis for other cities, until the percentage of minorities in the fire department is commensurate with the percentage in the community. Given a finding of racial discrimination in employment, affirmative hiring relief of some sort, with numerical objectives, is both appropriate and constitutional. As petitioners apparently acknowledge (Pet. 18), such relief has uniformly been sustained by the courts of appeals.[10] Indeed, the failure of a district court to order such affirmative relief after a finding of racially discriminatory employment practices has been held to be an abuse of discretion. *Morrow* v. *Crisler, supra* note 10.

When courts grant such affirmative relief to overcome the effects of past discrimination, they do not, as petitioners contend (Pet. 18–19), violate the anti-

[10] See *Castro* v. *Beecher*, 459 F. 2d 725 (C.A. 1); *Vulcan Society of New York* v. *Civil Service Commission of New York*, 490 F. 2d 387 (C.A. 2); *Erie Human Relations Commission* v. *Tullio*, 493 F. 2d 371 (C.A. 3); *Contractors Association of Eastern Pennsylvania* v. *Shultz*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Morrow* v. *Crisler*, 491 F. 2d 1053 (C.A. 5) (*en banc*), certiorari denied, October 21, 1974, No. 73–1838; *United States* v. *Local 212, IBEW*, 472 F. 2d 634 (C.A. 6); *United States* v. *United Bro. of Carpenters, Local 169*, 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *Carter* v. *Gallagher*, 452 F. 2d 315, 327 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (C.A. 9), certiorari denied, 404 U.S. 984; *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (C.A. D.C.).

preference provisions of Section 703(j). As the court of appeals correctly stated, that Section "deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer" (Pet. App. 40). See *Associated General Contractors of Massachusetts* v. *Altshuler*, 490 F. 2d 9 (C.A. 1), certiorari denied, 416 U.S. 957; *United States* v. *IBEW, Local 38*, 428 F. 2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *Contractors Association of Eastern Pennsylvania* v. *Shultz, supra* note 10.

3. Petitioners contend (Pet. 19–20), relying on this Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, that the Eleventh Amendment bars an award of costs on appeal against a state official.[11] The contention is answered by the decision in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, in which this Court held unanimously that costs may be awarded against a State as a litigant in the Supreme Court. The power to award costs is "within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction" (275 U.S. at 74–75). The rule should be no different with respect to the federal district courts and courts of appeals.

[11] While the United States was not, of course, directly affected by the award of costs to the private plaintiffs here at issue, we have an interest in this question because the efficacy of private efforts under Title VII and other analogous statutes (*e.g.*, 42 U.S.C. 3601, *et seq.*—fair housing) affects the government's enforcement efforts. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211.

In *Edelman,* the Court held that the Eleventh Amendment prohibited a federal court from ordering a state official to make retroactive payments of certain statutory benefits found to have been wrongfully withheld. Unlike the grant of retroactive benefits in *Edelman,* however, an award of court costs is not the equivalent of an "award of damages against the State" and is not "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" (415 U.S. at 668). Though the award of costs in the present case will have an impact on the state treasury, that impact is ancillary to the disposition of the case on the merits. So long as the principal relief is prospective in nature, an incidental award of court costs against a state official is a permissible consequence of the litigation itself and does not offend the Eleventh Amendment.[12]

[12] Although, as petitioners point out (Pet. 19), two courts of appeals have held that the Eleventh Amendment bars an award of attorneys' fees against a state official, that issue is not presented here. The court of appeals did not award attorneys' fees in this case, and the district court deferred consideration of the private plaintiffs' request for such an award (Pet. App. 76). The Court need not consider here, therefore, whether *Fairmont Creamery* or *Edelman* controls with respect to attorneys' fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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